Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MARA KIRSH and JOSEPH KIRSH,

Petitioners,

v.

THE CITY OF NEW YORK, THE COMMISSIONER OF THE DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK, DAVID BRADLEY MANAGEMENT CO., DAVID WEISS, DEBBIE LEUNG, JOHN WELLS, SHEILA SAMMS, JANE AND JOHN DOE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether A Court Appointed Administrator Acted "Under Color of Law" Within The Meaning Of 42 U.S.C. § 1983 Where He Was Appointed Pursuant To A State Statute Upon Application Of A City Agency To Manage A Small Apartment Building To Do Approximately $54,000.00 In Emergency Repairs and To Penalize The Owners For Their Harassing Of Tenants, And Without Prior Court Authorization And Without The Owners' Prior Knowledge And Consent, Removes and Disposes Of All Their Personal Property And Leases Out Their Home To Strangers For Extended Periods Of Time?

2. Whether The Allegations That The City of New York (HPD):

   (A) Was Implementing The 7A Statute To Take Property Away From Its Lawful Owners and Not Return It To Them,

   (B) Had Failed To Properly Instruct 7A Administrators And HPD Managers Respecting Statutory Requirements, And Implementation Of The Terms And Conditions Set Forth In The 7A Judgment, And The Rights Of The Owners Of The Property And The Duties Owned The Owners While Their Property Was in 7A Administration, And

   (C) With Respect To The Kirshes' Property Had Regularly Disregarded The Terms And Conditions Of The 7A Judgment and Statute, Acquiesced In The 7A Administrators' Routine Disregard Of And Violations Of The Terms and Conditions Of The 7A Judgment, And

   (D) Failed To Take Any Corrective Action When It Learned Of The Unlawful And Unconstitutional Actions of the 7A Administrator,

   Sufficiently Alleged A Predicate For Municipal Liability Under 42 U.S.C. § 1983.

3. Whether In The Absence Of Prior Court Authorization Or The Owners' Consent, The 7A Administrator's Repeated Entries Into The Kirshes' Home, Removal And Disposition Of All Their Property Without Prior Or After The Fact Notice, And The Leasing Of Their Home To Strangers Violated The Kirshes' Constitutional Rights And Whether The Kirshes Had To First Exhaust State Remedies Where The 7A Statute Exempted The City From Liability And The 7A Administrator From Any Personal Liability?

4. Whether The Imposition Of 7A Administration For The Purpose Of Punishing The Kirshes For Harassing Their Tenants For An Indefinite Period And Putting The Burden On Them To Justify The Return Of Their Property And Home To Them Was In Violation Of The Kirshes' Constitutional Rights Under The Fifth And Eighth Amendments?

5. Whether The Kirshes' Injury Was Sufficient To Satisfy Standing Requirements For Them To Challenge The Constitutionality Of The 7A Statute On Its Face Or As Applied?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Mara Kirsh and Joseph Kirsh, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The United States Court of Appeals for The Second Circuit summarily affirmed the judgment of the United States District Court for the Southern District of New York (Sweet, D.J.) on the basis of the District Court's decisions. ___ F.3d ___ (June 15, 1998). The Second Circuit's Order Affirming the District Court and the three decisions of the District Court (1995 WL 383236, 1995 WL 679242, and 1997 WL 375684) are reproduced as Appendices A, B, C, and D.

STATEMENT OF JURISDICTION

This Court has jurisdiction of the Petition and the orders, decisions and judgments for which review is being sought pursuant to 28 U.S.C. § 1254 and Supreme Court Rule 13.

STATEMENT OF THE CASE

A. Summary Of The Facts

1. *The 7A Statute And Overview Of The Facts*

In 1965 New York State enacted a special statute to deal with dangerous conditions in multiple dwellings of five or units for New York City and the Counties of Nassau, Suffolk, Rockland and Westchester. The statute, Article 7A of the Real Property Actions and Procedures Law of the State of New York ("RPAPL") §§ 769-82,[1] allows a municipality or the tenants of a building to apply to place

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[1] The relevant provisions of the 7A statute are reproduced in Appendix E.

a building under 7A administration to do emergency repairs necessary to protect the life, health and safety of the residents. Upon completion of the needed repairs, the statute contemplates termination of the 7A Administration with return of managerial control of the property to its rightful owner. In 1982 Section 770 of the 7A Statute was amended to allow a 7A proceeding to be initiated for "a course of conduct by the owner or his agents of harassment,[2] illegal eviction, continued deprivation of services or other acts dangerous to life, health and safety."

This case concerns the application of this statute by the City of New York and the wrongful, consistent disregard by the City and the Administrators it had selected of the very terms and conditions set by the court in the 7A Judgment. As a result Mara and Joseph Kirsh have suffered egregious deprivations of their fundamental constitutional rights, both property and personal.

On March 1, 1988, upon the application of the Commissioner of the Department of Housing Preservation and Development of the City of New York ("HPD"), the Kirshes' property was placed in 7A Administration to do $54,000.00 in emergency repairs[3] and an extended period of 7A Administration was imposed at the City's request as punishment for their alleged harassing of their tenants[4] for a period not shorter than five years.[5]

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[2] The acts constituting "harassment" were not defined in the 7A statute.

[3] Appeal Appendix Vol. I at 813, and ¶8 at 815. Hereinafter the Appeal Appendix shall be referred to as "R."

[4] One of the alleged acts of harassment was the banging on a tenant's apartment door late at night which was presumed to have been done by the Kirshes.

[5] HPD had instituted an *in-rem* action in the Civil Court of the City of New York, Housing Part, on or about July 27, 1987. The Kirshes' request for a jury trial was denied and they were not allowed any discovery.

In August 1988, Mara Kirsh was enjoined from going within ½ mile of the building while the property was in 7A Administration[6] and HPD advised the Kirshes that the injunction also applied to Joseph Kirsh. Since the Kirshes lived in the building, their home being the ground floor rooms,[7] and being denied any part of the rental income for personal daily living expenses and basic needs, the bar was especially punitive, onerous and impoverishing for the Kirshes.

Although more than ten (10) years have elapsed since their property was placed in 7A Administration, the City has not returned control of their property to them and they still can't go home and have never been paid any surplus money.[8] They are, consequently, still being punished and in September 1994 they learned that HPD stated that it did not intend for them to ever get control of their property back.[9]

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[6] HPD had petitioned the court to hold Mara Kirsh in criminal contempt for interfering with the Administrator. The facts are set forth in *Kirsh v. Michetti*, 787 F. Supp. 403, 404-05 (S.D.N.Y. 1992).

[7] The 7A Judgment allowed the Kirshes to have exclusive use of the ground floor rooms without having to pay rent. R-II at 976. (Affidavit of HPD Official Frank Vera.)

[8] The 7A Judgment set forth the priority of expenditures that could be made after the emergency repairs for which 7A administration was imposed. Included in this list was payment of the balance of money left (the "surplus") to the owners. R-I at 36-37. Plaintiffs estimated that as of September 1996 approximately $500,000.00 in rental income have been received, the disbursement of which had not yet been accounted for—at least to them, The emergency repairs for which the 7A Administration was imposed to correct were deemed by the state court to have been long completed by the time it ordered the property taxes to be paid in September 1991. (Statements of N.Y.S. Supreme Court Justice Paula J. Omansky, OR-II at 848.)

[9] In September 1994, Mara Kirsh's mother inquired of New York City's Small Property Owner's Advocate when the property would be taken out of 7A Administration and returned to the daughter and son-in-law and, in response to her inquiry, she was subsequently informed that according to HPD the Kirshes would never get their building back. (R-I at 352-53.) This

(continued...)

Over the years the Kirshes complained to HPD and the court, basically to no avail, that the terms and conditions of the 7A Judgment were not being adhered to by the 7A Administrators. For example monies were being expended in violation of the decree's restrictions and required court authorization wasn't being sought. In addition property taxes weren't being paid, as the 7A Judgment required,[10] and surplus monies were not paid over to the Kirshes,[11] also as the decree required.

The 7A Judgment also required the Administrator to file monthly reports with the court and to personally appear before the court at intervals not less than 60 days. Notwithstanding, the monthly reports were not filed with the court and the Kirshes were also not being served with copies of the monthly reports and the required court appearances did not take place. Though the Kirshes complained to the Administrators, HPD and to the court, the disregard of these requirements of the 7A Judgment continued uncorrected and, in fact, with HPD's acquiescence, if not approval, as more fully explained below.

In October 1994 the Kirshes discovered that in 1993 the then 7A Administrator, without notice to the Kirshes and without their consent, and without applying to the court, removed and disposed of all of their personal property! They further discovered that in early

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[9] (...continued)
confirmed and was consistent with an announcement made shortly before HPD filed its 7A Petition. (R-II at 813-14.) At a press conference held on July 13, 1987, a high City official announced that the City intended to take the Kirshes' property from them and never return it to them.(R-II at 908.) Two weeks later, HPD filed its 7A Petition.

[10] In response to one of their complaints, the court ordered the taxes to be paid and the property removed from the City's *in rem* list of properties with delinquent taxes. R-II at 845, 848-57. The taxes were subsequently again not paid and the property again placed on the *in rem* list.

[11] The building's rental income was the Kirshes' sole source of income and the denial of any part of that income for their daily living expenses and basic needs resulted in their impoverishment and contributed to their decline in health.

1994, the 7A Administrator had rented out their home to strangers. Needless to say this too was done without the Kirshes' prior knowledge or consent, and without court authorization.

While there was some question of when HPD first knew, or should have known about these actions, by April 1994 HPD admitted it knew what had happened. Notwithstanding, HPD didn't take any corrective action and didn't even notify the Kirshes[12] or the court of the 7A Administrator's wrongful actions or seek his removal. After the Kirshes learned what happened, they attempted to get HPD to take corrective action, and when that failed, sought, to no avail, assistance from the Office of Corporation Counsel for the City of New York and from the Office of New York City's Mayor.

The Kirshes then instituted an action in the United States District Court for the Southern District of New York in November 1994 pursuant to 42 U.S.C. § 1983 against the City, HPD officials and the 7A Administrators. Relief was sought in federal court rather than in state court because the 7A statute in Section 778 immunizes the City from liability for the acts of the 7A Administrator and it exempts the 7A Administrator from personal liability.

2. *HPD And The 7A Administrators*

Under Section 778, subpar. 5, HPD establishes "the rules and regulations regarding criteria for the selection of [7A] administrators" and the court required is to appoint as 7A Administrators persons from HPD's list of qualified persons. HPD provides a mandatory 7A training course for the prospective administrators and has established the format and requirements for the 7A Administrator's monthly report and accounting, which under the 7A Judgment the 7A Administrator is required to comply with. The 7A Administrators were all selected and trained by HPD and appointed by the court upon HPD's application.

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[12] Since the Kirshes had repeatedly complained that they were not being sent the monthly reports, HPD knew or should have known that the Kirshes were unaware of what had happened.

Where HPD is the 7A Petitioner, as in this case, the HPD Commissioner or his designee may be the 7A Administrator. (Section 778 subpar. 1.) Here, HPD designated each of the persons who have acted as the 7A Administrator of the Kirshes' property as the Commissioner's designee. Each of these persons have been compensated for their services out of the property's income. (Section 778, subpar. 2.)[13]

In addition in all court proceedings relating to the property's being in 7A administration, with the exception of the present case,[14] City attorneys, either HPD staff attorneys or attorneys from the Office of Corporation Counsel of New York, have represented the 7A Administrators in litigation with the Kirshes.

David Weiss, the 7A Administrator who disposed of the Kirshes' property and leased out their home, testified that in the 7A training course he attended, he received no instruction on the 7A statute, on the owner's rights or on the 7A Administrator's obligations to pay the property taxes or the surplus income to the owners.[15]

In addition, HPD supervises and oversees the 7A Administrators.[16] HPD assigns an HPD official to be the 7A Manager of the property and Counselor to the 7A Administrator. This HPD official is responsible to see that the repairs required by the 7A Petition and Judgment are made and that the property is otherwise managed in accordance with the requirements, terms and conditions of the 7A Judgment. To this end HPD also has a specific 7A training course

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[13] Since the Kirshes objected to and opposed the imposition and continuation of 7A administration, use of their property's income to pay the 7A Administrator's fee was not voluntary on their part.

[14] In this case, Corporation Counsel requested the District Court to dismiss the claims against the 7A Administrators who had defaulted after initially appearing in the action.

[15] R-I at 525-27, 538-41.

[16] HPD may seek the removal of any 7A Administrator that refuses to follow its instructions and regulations.

for its employees who will fill this position. In this case Ms. Sheila Samms testified that she attended a sixteen week training course.[17]

The HPD 7A Manager and 7A Administrator enter into a compliance agreement for each property in 7A administration setting forth the goals for managing the property in accordance with the requirements of the 7A Judgment (¶ 11c) and the 7A statute. A new compliance agreement is executed annually, or more frequently, if necessary. The HPD Manager inspects the property, reviews the monthly reports and re-visits the property periodically, or as necessary, to verify certain work has been done, or that there is a vacancy, or when there has been a large expenditure, or if a problem arises.

According to Ms. Samms, the terms, conditions and requirements that were to be followed were those set forth in the 7A Judgment. However, Ms. Samms testified that upon her assignment as 7A Manager to the Kirshes' property she was not given a copy of the 7A Judgment, did not try to obtain a copy or find out what the 7A Judgment required[18] and first saw it when she was served with the Summons and Complaint.[19] The only court order that she had was that appointing David Weiss as the 7A Administrator. Accordingly, she didn't know what emergency repairs were required by the 7A Judgment and thus was in no position to determine what additional work required court approval. As a result, she wasn't in a position to assure that the 7A Judgment was being followed and properly implemented. She testified further that under the circumstances that her only concern was to see that the rents were collected and the rent money spent on the property.[20]

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[17] R-I at 449-50, correction at 501.

[18] R-I at 451.

[19] Ms. Samms also testified that she was never told prior to April 1994 by her supervisor or any other HPD official that the owners had an apartment in the building and were allowed under the 7A Judgment to keep their home or that the property taxes were to be paid. R-I at 45, 460-61, 474-75, 486-89.

[20] R-I at 456-57, 498.

Ms. Samms also testified that one of the responsibilities of the HPD 7A Manager was to look after the property owner's interests since the owner is usually barred from the property.[21] However, she was never instructed concerning what the owner's rights were and did not herself know what they were.[22] Furthermore when she read the reports indicating that furniture, appliances, equipment, clothes, etc were being removed, she never sought to ascertain whose property was being removed and disposed of. All she did was visit the building to make sure that the work was being done.[23] When she finally learned in April 1994 that the ground floor rooms were the Kirshes' home, neither she nor her supervisor took any corrective action, or notified the Kirshes or the court or sought Weiss removal. In fact, Weiss testified that HPD never instructed him to terminate the illegal leases or not to renew them.[24]

Weiss defended all his actions as being authorized by the original 7A Judgment.

3. *Defendants' Consistent Failures To Comply With the 7A Judgment*

The 7A Judgment[25] specifies the limited authority and obligations of the 7A Administrator. First, the 7A Judgment imposed a monetary limit on what could be spent without prior judicial authoriza-

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[21] R-I at 451-52, 471-73.

[22] R-I at 450-54.

[23] Removal and disposition of the Kirshes property took place in June, September and October 1993. The volume of material removed was astonishing: 84 truck loads and four (4) 30 yard dumpsters, at a cost of $8720.00 which was well in excess of the $3500.00 limit authorized by the 7A Judgment.

[24] The front room was leased to a commercial tenant for five years—which was in violation of Section 778 subpar. 1 of the 7A statute. The rear ground floor rooms were leased to a residential tenant for one year term and renewed even after the Kirshes objected and instituted this action.

[25] The 7A Judgment conforms with the 7A statutory requirements.

tion. Paragraph 7 of the 7A Judgment required prior court for "any contract for repairs and services in an amount in excess of $3500.00 ***. (R-I at 35.) This limitation was repeatedly ignored by the 7A Administrators[26] and according to Ms. Samms, HPD routinely allows and acquiesces in 7A Administrators' submitting partial invoices so as to avoid having to apply for court authorization. (R-I at 466-67; 469.) Here, this practice allowed, *inter alia*, Mr. Weiss to pay for the removal and disposal of the Kirshes' property from the building at a cost of $8720.00, without prior court approval.[27]

Second, the 7A Judgment set the priority of expenditures (¶ 9, R-I at 36-37), requiring first that monies be spent to do the repairs listed in HPD's Petition and prohibited any other expenditures except for fuel, ordinary repairs and maintenance, insurance, repayment of loans taken to do the repairs listed in the Petition, and a reasonable fee to the Administrator. Property taxes were then to be paid, then any outstanding emergency repair expenses and liens and then the surplus was to be paid over to the owners of the property. If the 7A Administrator wished to do other repairs, including ones of an emergency nature, prior court authorization had to be obtained. (¶ 10, R-I at 37.) Notwithstanding these provisions, none of the 7A Administrators ever applied to the court to do any additional repairs, repeatedly failed to pay the property taxes except once when the court ordered HPD to have them paid,[28] then

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[26] For example, according to the July 1993 Monthly Report Mr. Weiss paid Acme Construction $4428.25 for water pipe work. R-II at 1046.

[27] The removal of the Kirshes' property consisting of furniture, appliances, equipment, motorcycles, clothes, etc.,was reported to have required 84 truck loads and four 30 yard dumpsters. R-II at 1047, 1224, 1226; R-I at 688. Mara Kirsh attested that their home contained antique furniture, an antique and modern Leica camera collection, jewelry, poetry, art work and paintings, family correspondence and memorabilia. R-II at 902-04. No record of the items removed and disposed of was made and Ms. Samms never inquired what and whose property was being removed and disposed of though it was part of her official responsibilities to look after the owners' interests since the owners are usually barred from the property. R-I at 451-52, 471-73.

[28] R-II at 848.

failed to pay them again, and never paid any money over to the Kirshes.[29]

The 7A Judgment in Paragraph 11 (R-I at 37-38) requires the 7A Administrator to personally appear before the court "at intervals not less than sixty (60) days on dates and times set by the Court" to report to and review the management and operation of the premises, the monthly financial reports and to provide the court with any other report it or HPD requested. The 7A Administrator is also required to file with the court and HPD[30] a monthly report of the receipts and expenditures made, and any other information requested, before the 20th of each month for the preceding month. All vacancies had to be reported to the court and if the vacancy lasted more than 30 days, then the Administrator had to submit an application for the Emergency Assistance Rehousing Program for renovation and renting of the vacant apartment. Except for the filing of the monthly report with HPD, none of these requirements were complied with, notwithstanding complaints made by the Kirshes to HPD and the court.[31]

Finally, when any 7A Administrator resigned, a final report setting forth a full accounting was also required to be filed with the court and served on the parties as a condition to their withdrawal. Though there have been four 7A Administrators to date, none of the three who resigned and relieved of their 7A Administrative re-

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[29] R-II at 908; R-I at 444.

[30] Since the Kirshes were parties to the 7A action, the monthly report was also required to be served on them under New York State's Civil Practice Law Rules ("CPLR") 2103(e).

[31] By letter and by proceedings they initiated in state court, the Kirshes repeatedly complained that the reporting requirements were not being complied with and that property taxes were not being paid as required. R (Exhibit Volume) at 141-43, 176-77, 190-95, 205-06, 249, 250; R-I at 443-44; R-II at 848, 908-09. *See also* transcript of New York Supreme Court Justice Omansky's order requiring property taxes to be paid. R-II at 856-58 and Report of the Finance department of New York City that property was placed *in rem* for failure to again pay the property taxes. R-II at 884-89.

sponsibilities filed any such final report or served Plaintiffs with one.

Thus as implemented, the routine, ongoing and close court oversight and supervision required by the 7A statute and Judgment were never had.[32] Presumably the court relied on HPD to make sure the law and its decree were being followed but HPD adopted a policies, practices and procedures that encouraged and facilitated, if not approved of, the routine disregard of all the terms, conditions and restrictions applicable to the administration of the property under the 7A Judgment.

4. *Plaintiffs' Prior Applications For Relief From State Court*

Prior to the institution of this action the Kirshes applied to the local courts for relief four times, and repeatedly brought to the court's attention, and HPD's, the fact that the terms, conditions, and restrictions of the 7A Judgment were being routinely disregarded, including that they were not receiving the monthly reports, that the 60 day court appearances were not being had, that the property was not being properly maintained and managed and that the property taxes were not being paid. They also requested that the 7A Administration of their property be terminated and that they be allowed to return to their home.[33] In 1991 the Court ordered the property taxes paid and the property be removed from *in rem* proceedings for failure to pay the property taxes. This was done but subsequently,

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[32] Had discovery been allowed with respect to other properties in 7A Administration, Plaintiffs believe that they would have been able to show that these practices were not the exception but common place.

[33] Plaintiffs' applications to State Court were made on November 7, 1988, November 7, 1989, June 6, 1990, and June 12, 1991. R-Ex. Vol. at 103-35, 130-67, 185-229, 230-75, respectively. While preparing a fifth, they were arrested and subsequently convicted of sending threatening letters to people and organizations. *United States v. Kirsh*, 54 F.3d 1062 (2d Cir), *cert. denied*, 516 U.S. 927 (1995). The Second Circuit recently ordered a Habeas Corpus hearing be held.

the taxes again were not paid and *in rem* proceedings again initiated.[34]

5. *The City's Policies, Customs And Practices In Its Application Of The 7A Statute*

The original Complaint (Appendix F) alleged that the City was applying the remedies available under the 7A statute as a means of taking property from the owners without just compensation and that the Kirshes' case was an example of this.[35] The City was doing this by instituting 7A proceedings without disclosing its true intent never to return the management of the property to the rightful owners. Instead, as the evidence developed in this case showed, the City by not returning management of the property to the owner when the emergency repairs were made or at the end of an extended term imposed as punishment, and by not requiring its designee 7A Administrators to strictly follow the 7A Judgment, including requiring the payment of property taxes, was proceeding in a way that would cause the owner of the property to lose title to the property as a result of a tax sale or foreclosure. Though the District Court denied all discovery on this issue, and though the City publishes no reports on the number of properties under 7A Administration, the duration of 7A Administration and the ultimate disposition of those properties, the evidence showed that:

– HPD did not instruct either the prospective 7A Administrators or HPD 7A Managers concerning the owners' rights, the obligation under the statute or 7A Judgment to pay the property taxes and surplus to the owners. Where 7A administration is imposed for an

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[34] R-II 848-57. See also HPD's Settlement Stipulation dated August 14, 1992, that the property would again be taken out of *in rem* proceedings and not be listed for tax sale. Notwithstanding, the property was placed and remained on the *in rem* list. R-II at 884-89.

[35] The Proposed Amended Complaint set forth the City's Policies, Practices and Customs, actions and omissions in detail that caused or contributed to the constitutional violations in detail. R-II at 947-57.

extended term as punishment, these provisions are important provisions protecting the owners' interests.

– HPD disregarded, acquiesced in and acceded to the 7A Administrators routine disregard of the requirements, terms and conditions of the 7A Judgment, to the detriment and violation of the owners' rights and interests under the court degree and the laws of the State of New York.

– HPD did not require its designee 7A Administrators to file the monthly reports with the court or to serve the owners with a copy of the monthly report, or otherwise to appear and report to the court as the 7A Judgment required, thereby assuring that there would be no regular public accounting or exercise of judicial oversight that both the statute and the Judgment required.

With respect to the Kirshes, that HPD had no intention of having management of the property returned to them, or any concern for their rights is evidenced by not only the above practices which occurred with respect to their property, but HPD's failure to provide Ms. Samms with a copy of the 7A Judgment so she could do her job and her own failure to acquire a copy of the 7A Judgment, and by HPD's failure to take any corrective action once it learned what Weiss had done with respect to the Kirshes' home and personal property.

B. Proceedings in District Court

1. *The Original Complaint*

The Complaint sought to terminate the 7A Administration of the Kirshes' property and other equitable and legal relief, including damages, for violations of their federal and state constitutional rights and their rights under state law. In the First Claim, the Kirshes alleged that the Respondents had:

> "intentionally or with reckless and callous disregard of [their] rights entered, or caused, or authorized others to enter, remove and dispose of Plaintiffs' personal property and lease and rent

> Plaintiffs' [home] *** to other persons or entities, without prior notice to Plaintiffs and a hearing before a court with jurisdiction, or acceded to or acquiesced in these unlawful and unconstitutional acts. Defendants have thereby taken, removed, destroyed, disposed of and otherwise deprived Plaintiffs of their home and property and violated their constitutionally protected liberty and privacy rights and interests without Due Process of Law ***. ***"

The Second Claim alleged with respect to both their personal and real property Respondents' actions were in violation of the Just Compensation Clause.

The Third Claim alleged that the numerous entries into their home, searches and seizures, removal of their personal property and rental of their home to others, constituted violations of their constitutionally protected rights under the Fourth and Ninth Amendments, including their privacy rights,

> "to be secure in their persons, houses, papers and effects against unreasonable seizures, not to have their property seized except upon issuance of a warrant [issued] by a neutral magistrate upon a showing of probable cause, and not to have the sanctity of their home and their fundamental privacy interests violated by unwarranted governmental intrusions."

The Fourth Claim alleged that Respondents' not returning control of their property to them and lifting of the injunction barring them from their home, in themselves, and cumulatively with the other deprivations, were in violation of the Eight Amendment's prohibitions against cruel and unusual punishment and excessive fines.

In the Fifth Claim the Kirshes challenged the constitutionality of the 7A statute on its face under the Equal Protection Clause since it only applied to a few counties in the State of New York and, in the Sixth Claim, as applied by the City of New York, under the Due Process and Just Compensation Clauses because the City was having buildings placed under 7A Administration with the secret intent that control of the property would never be returned to the owner

and that the City would subsequently acquire title to the property as a result of the property taxes not being paid.[36]

Finally, the Seventh and Eighth Claims alleged that the Respondents had breached their fiduciary duties and had mismanaged the property in violation of the 7A Judgment and applicable professional standards of care.

2. *The District Court's First Partial Dismissal Decision*[37]

(a) The First And Third Claims

In its first decision the District Court granted in part the City's motion for dismissal. It dismissed the First and Third Claims as against the City because it found that the Complaint did not adequately allege a basis for municipal liability.[38] The District Court also dismissed these Claims as against the HPD Commissioner[39] but not as against Ms. Samms.

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[36] The District Court did not allow Plaintiffs to have any discovery in connection with these claims and the information about properties that the City had placed in 7A Administration is not otherwise available under a Freedom of Information Act request or in any City published report.

[37] 1995 WL 383236, Appendix B.

[38] The proposed Amended Complaint (Appendix G) sought to cure any of the technical pleading deficiencies but the District Court found that pleading deficient too notwithstanding its detailed, specific allegations. It should also be noted that the District Court denied Plaintiff all discovery except with respect to Samm's knowledge and even with respect to that issue discovery was limited to her log entries. Her reports to her supervisor, his instructions to her, correspondence, the reports and notes of the inspector who accompanied her to the building, the compliance agreements and the deposition of any one other than Samms and Weiss were not allowed.

[39] Plaintiff had sought injunctive and equitable relief against the Commissioner.

(b) The Just Compensation (Second) Claim

The District Court dismissed the Second Claim that there had been a taking without Just Compensation of their personal property, home and the building. With respect to the building and its income, the District Court held that there had only been a temporary regulatory taking that did not go too far nor deny them the expected economic benefits of their investment. With respect to the leasing out of their home, the District Court held that it was not a permanent taking because it could be recovered upon expiration or termination of the tenancies. Finally, with respect to their personal property,[40] the District Court held that the claim was not ripe because the Kirshes had not alleged that they applied for available statutory remedies notwithstanding the fact that the 7A statute exempted the City from liability for the Administrator's actions and that the 7A Administrator's liability was limited to his official capacity.

(c) The Fourth Claim

The District Court dismissed the Fourth Claim on the grounds that the term of 7A Administration was a sanction to secure compliance, the Kirshes could apply for termination of 7A administration and could correct the conditions for which 7A administration was imposed.

(d) The Fifth And Sixth Claims

The District Court held that the Kirshes lacked standing to challenge the constitutionality of the statute on its face or as applied

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[40] Except for some motorcycles and motorcycle parts, all of the Kirshes' personal property had been disposed of. During the course of the litigation the City disclosed that the motorcycles and motorcycle parts were placed in storage and Plaintiffs learned that the storage fees were never paid. R-II at 934.

under the Due Process and Just Compensation Clauses[41] because the Complaint failed to allege that there had been a final decision or that adequate state remedies were unavailable.[42] In its second decision the District Court also dismissed the Kirshes' Equal Protection Claim.[43]

3. *The District Court's Dismissal Of The Claims Against Weiss And Samms*[44]

The District Court[45] subsequently granted Weiss' motion for summary judgment and dismissed all the claims against him. The District Court held that as a 7A Administrator, Weiss was not a state actor under 42 U.S.C. § 1983 and that his actions did not constitute state action under Section 1983.

With respect to Samms, the District Court also granted her motion for summary judgment finding that there was no factual dispute that she had authorized Weiss' actions or found out about them prior to April 1994. In so concluding, the District Court not only disregarded the evidence that Ms. Samms did know what Weiss was doing, the credibility issues respecting her testimony about what she knew and when,[46] her failure to take any remedial action or to

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[41] All discovery requests made with respect to this claim were suppressed by the District Court. The information sought respecting the City's implementation of the 7A statute is not publicly available or available on a Freedom of Information Act request.

[42] The proposed Amended Complaint included such allegations, with detailed supporting facts. (¶s 16-25, App. G.)

[43] No discovery was allowed on this issue either.

[44] 1997 WL 375684, Appendix D.

[45] The District Court also denied Plaintiffs' motion to amend their Complaint and for additional discovery.

[46] The scope of discovery that the District Court allowed was unduly and improperly limited. Plaintiffs were denied discovery, for example, of her reports to her superior, her superior's notes and records respecting his

(continued...)

notify the Kirshes or the Court. Finally, the District Court did not address the alternative bases for Section 1983 liability that the Plaintiffs had advanced.[47]

C. The Decision Of The Second Circuit

On appeal to the United States Court of Appeals for the Second Circuit, the Court entered a summary order affirming the District Court on the basis of its three decisions.

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[46] (...continued)
instructions and communications with her respecting the Kirshes and their property, the notes and reports of the building inspector who accompanied her on her visits to the property, any correspondences and notes of communications with Weiss, and Weiss' to and with her. Plaintiffs were also denied access to the 7A file on their building to ascertain if in fact Ms. Samms had the 7A Judgment in that file and were not allowed to depose any other HPD official so it could be ascertained what Ms. Samms knew and when respecting the Kirshes and their property.

[47] The alternative predicates were:

– the existence of municipal policies, customs and practices that caused or led to the violations, gave rise to the deliberate indifference to the Kirshes' constitutional rights and contributed to the violations, including the decision that the Kirshes would never get their property back,

– the inadequacy and failings in the training of 7A Administrators and their HPD 7A Managers,

– the failure of 7A Administrators, with the knowledge, acquiescence and tacit approval of HPD, to adhere to terms and conditions set forth in 7A Judgments, and

– the failure of City officials to take corrective action but rather acceding, acquiescing and approving violations of the terms and conditions of the 7A Judgments, and the property owners' constitutional rights.

REASONS FOR GRANTING THE WRIT

I.

THERE'S A CONFLICT AMONG THE CIRCUITS RESPECTING 1983 LIABILITY OF PERSONS APPOINTED BY COURTS AS TO WHETHER THEY ARE ACTING UNDER COLOR OF STATE LAW

There is a conflict and inconsistency among the United States Courts of Appeals for the Second, Third, Fourth, Seventh, Ninth, and Tenth Circuits respecting the issue of whether a person appointed by a court to fulfill a certain function is acting "under color of law" for the purposes of determining liability under 42 U.S.C. § 1983.

In addition to the present case,[48] the Seventh Circuit held in *Loyd v. Loyd*, 731 F.2d 393, 398-99 (1984) that a court appointed administrator of an decedent's estate is not acting under color of law within the meaning of Section 1983. Similarly, the Tenth Circuit in *Meeker v. Kercher*, 782 F.2d 153 (1986) with respect to a court appointed guardian *ad litem* in a child abuse case, held that the court appointed guardian was not acting under color of law. In both of these latter cases, the courts construed that person in question was performing traditionally private activity rather than a state function irrespective of whether the appointment was pursuant to a state statute, subject to judicial control and review, or coercive.

The Fourth Circuit in *Thomas S. v. Morrow*, 781 F.2d 367, 377-78, *cert. denied*, 476 U.S. 1124 (1986), also involving a guardian *ad litem* for a person adjudged incompetent appointed pursuant to a statute, the Third in *Hohensee v. Grier*, 373 F. Supp. 1358, 1363-64 (M.D. Pa. 1974), *aff'd*, 524 F.2d 1403 (3rd Cir.), *cert. denied*, 426 U.S. 940 (1975), respecting a court appointed receiver of a corporation with plenary authority and appointed pursuant to an ex-

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[48] The District Court's reliance on the IBT Teamsters cases was misplaced. There the Administrator was appointed pursuant to a private agreement of the parties and was voluntarily paid by the parties. *United States v. Int'l Brotherhood Of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO*, 941 F.2d 1292, 1295-96 (2d Cir. 1991).

traordinary exercise of the state court's equitable jurisdiction and subject to its control, and the Ninth Circuit in *Lebos v. Judges of the Superior Court, Santa Clara Cty.*, 883 F.2d 810, 817-18 and n.10 (1989), with respect to a court appointed receiver, appointed pursuant to a state statute, to collect a judgment against an attorney, held that the court appointed individuals were acting under color of law for the purposes of establishing their liability under Section 1983.

The Second Circuit's decision in this case can not be reconciled with the decisions in the latter four cases. The factors the District Court relied on to support its conclusion that there was no state action were either not determinative under this Court's prior decisions or actually supported the opposite conclusion. For example, though this Court held that whether the person is employed or not by the state or other governmental unit is not determinative,[49] *West v. Atkins*, 487 U.S. 42, 51 (1988), the District Court placed substantial reliance on that fact Weiss was not a City or State employee. (1995 WL 383236 at 3, Appendix B; 1997 WL 375684 at 5, Appendix D.) The lower court also relied on the fact that the 7A Administrator was not paid by the City or the State[50] (1997 WL 375684 at 6, Appendix D), even though the 7A Administrator was paid from the rental income, which is money belonging to the Kirshes, against their will, pursuant to a state statute and under court order—an obvious exercise of state power. *See Lugar v. Edmondson Oil Co. Inc.*, 457 U.S. 922, 940-41 (1982), holding that private party's use of constitutionally deficient statutory remedy for private purposes was sufficient to establish joint action with state for satisfying "under color of law" requirement for 1983 action.

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[49] The issue rather is whether Weiss "was acting under authority explicitly or implicitly delegated by the State when he carried out the challenged actions." *Morse v. Republican Party of Va.*, 517 U.S. 186, 116 S.Ct. 1186, 1208, 134 L.Ed.2d 347 (1996).

[50] *Cf. Polk County v. Dodson*, 454 U.S. 312, 320-21 (1981) holding that the fact that a public defender is paid by the state is not enough to establish state action under Section 1983.

Similarly, the court's reliance on the fact that "[t]he 7A Administrator acts according to the provisions of a compliance agreement ***" (1997 WL 37684 at 6, Appendix D) is also not helpful because the "compliance agreement" here was not between private parties but between HPD and the 7A Administrator, which was mandated by the 7A statute, and required by the 7A Judgment, indisputably a state imposed requirement.

Finally, the District Court in interpreting the 7A Administrator as acting on behalf of the tenants to correct the hazardous conditions for which 7A administration was imposed to correct, *ibid* at 5, disregarded several important factors:

– First, the HPD Commissioner brought the Petition in his own name and not on behalf of the tenants and selected the 7A Administrator as his designee for administering the property.[51]

– Second, the 7A Administrator is acting pursuant to a complex statutory scheme and judicial order, subject to monitoring and supervision by a public agency and the court according to state established standards. *Cf. Blum v. Yaretsky*, 457 U.S. 991, 1003-05 (1982) holding that where the state does not impose the standards that are to be applied in making a particular decision, but the standards are independently set by the profession, an insufficient nexus exists to establish a right of action under Section 1983.

– Third, the 7A Administrator is claiming personal immunity pursuant to the 7A statute's limiting his liability to his "official

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[51] Under the City's espoused point of view that the 7A Administrator is not subject to its supervision and control, the 7A Administrator would be the person with plenary authority over the property, making all administrative and policy decisions. If so there would be state action, *cf. Jett v. Dallas Indep. Sch. Dis.*, 491 U.S. 701, 737-38 (1989) holding that municipal liability may exist where official with delegated authority is final decision maker, policy maker; and *Pembaur v. Cincinnati*, 475 U.S. 469, 485 (1986) person acting as final decision maker for municipality sufficient to establish predicate for municipal liability. Weiss, on the other hand, claimed he was subject to the control and supervision of HPD and entitled to personal immunity under the 7A statute, with which the District Court, in *dicta*, agreed. 97 WL 375684, at 10-11, n. 3, Appendix E.

capacity," which is clearly inconsistent with the proposition that the Administrator is not a state agent.[52] *Cf. Wyatt v. Cole*, 504 U.S. 158, 168 (1992), holding that immunity for 1983 violations is not available to private persons.[53]

– Fourth, the 7A Administrator was fulfilling the regulatory and police powers vested in HPD with respect to correcting the hazardous conditions cited in the 7A Petition and after they had been remedied, managing the property for the extended term of 7A Administration as statutorily authorized and judicially imposed punishment, a " 'traditionally **exclusive** prerogative of the State.' " *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982), quoting with emphasis added *Blum v. Yarestsky, supra*, 457 U.S. at 1011.

– And, finally, the bar against the Kirshes going within ½ mile of the building was imposed on Mara Kirsh by the court as punishment for criminal contempt and extended by HPD to Joseph Kirsh pursuant to its authority as a regulatory agency and as an exercise of its governmental police power. (The tenants didn't have either the regulatory or police power to so punish the Kirshes.)

To resolve the conflict and clarify the law is this area, especially with regard to the criteria to be applied to determine when a person appointed by a court is fulfilling a private function and not acting under color of law within the meaning of Section 1983 the writ of certiorari should issue.

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[52] The District Court also strongly suggested that the 7A Administrator was entitled to the benefits of judicial immunity. 1997 WL 375684 at 10-11, n.3.

[53] States are not able to exempt persons from liability under Section 1983 which is a matter for Congress to decide. *Tower v. Glover*, 467 U.S. 914, 920-22 (1984).

II.

THE SECOND CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT ON IMPORTANT QUESTIONS OF FEDERAL LAW

A. THE DECISIONS BELOW THAT THERE WAS NO ADEQUATE PREDICATE FOR MUNICIPAL LIABILITY CONFLICT WITH AND FAIL TO FOLLOW THE DECISIONS OF THIS COURT

The Kirshes advanced five predicates for municipal liability: First, with respect to the loss of their personal property, the invasions into their home and the leasing of their home, that Weiss' wrongful acts would never have occurred had the HPD required him to strictly adhere to the requirements and procedures set forth in the 7A Judgment and statute, and had properly trained him and HPD's 7A Managers with respect to the proper implementation of 7A Judgments, with due regard for the property owner's rights and the obligations owed the property owner.[54]

Second, that the City's long term and routine disregard of those mandatory provisions, acquiescence in and ratification of practices in violation of or in non-compliance with the 7A Judgment and statute were contributory causes and constituted a policy, custom and practice that was illegal, an unlawful implementation of the 7A program, and in violation of the owners' constitutional, property, proprietary and other personal rights.

Third, that the City in exercising its rights and powers under the 7A statute had adopted and pursued a policy to exercise its rights and powers under the 7A statute to take control of properties away from the lawful owners with the intent never to return the property to the owners and eventually acquiring title as a result of non-payment of property taxes and that pursuant to this policy the City allowed, encouraged and acquiesced in the 7A Administrators dis-

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[54] Had the 7A Administrators been appearing every 60 days before the court, as required, it is unlikely that any of the wrongful conduct would have occurred. Similarly, if the Kirshes been served with the monthly reports, it would have been unlikely that Weiss would have ever attempted to remove their property from their home.

regarding the 7A Judgment, allowed the property taxes not to be paid and the property placed into *in rem*, and announced that the Kirshes would never get their property back.

Fourth, that the City and the 7A Administrators acted in concert to implement the 7A program in such a way that the owners' rights were disregarded and to achieve the City's unlawful and unconstitutional objectives.

Fifth, that once the City had actual notice that the 7A Administrators were not acting in compliance with the 7A Judgment or in violation of the statute, that Weiss was removing the owners' property from the building and then leasing out their home, the City, as both the responsible party litigant, and the responsible governmental entity, was obligated to take corrective action and here, instead, it had consciously disregarded and ratified the violations of the 7A Judgment and statute, and the Kirshes constitutional and other personal and property rights.

In rejecting these theories the lower courts failed to follow and properly apply the decisions of this Court respecting municipal liability under Section 1983. This Court has recognized that under Section 1983 municipal liability may be predicated upon a number of bases or theories, including the existence of a formal or informal policy, widespread custom or established practice that directly caused or contributed to the constitutional violation, *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694-95 (1978), *Board of the Cty. Commissioners of Bryan Cty. v. Oklahoma*, 520 U.S. 397, 117 S.Ct. 1382, 1390, 137 L. Ed. 2d 626 (1987), or indirectly caused, contributed or led to the alleged constitutional violation, as, for example, the result of inadequate training or deliberate indifference to a known need or one that should have been anticipated. *City of Canton Ohio v. Harris*, 489 U.S. 378, 387-90 (1989). Deliberate indifference contains a "conscious disregard" element that may be satisfied by either continued adherence to an approach that is known or should be known to have failed to prevent the wrongful conduct or by the acquiescence in a pattern of constitutional violations. *Id.* at 397, and 390-91 (O'Connor, J. concurring), cited and quoted in *Board of the Cty. Commissioners of Bryan Cty. v. Oklahoma, supra*, at 1390. Liability may also arise where upon

learning of a constitutional violation there is a duty to act to correct the violation and corrective action is not taken. *Gebser v. Lago Vista Indep. Sch. Dis.*, ___ U.S. ___, 118 S. Ct. 1989, 1999-2000, 141 L.Ed.2d 277 (1998) applying 1983 jurisprudence to Title IX and concluding that if responsible official had actual knowledge of discrimination there would be a duty to take corrective action and the failure to do so would be actionable. Here, in addition to repeated complaints that the 7A Judgment was not being adhered to, for and extended period of time HPD officials knew of the egregious constitutional violations regarding the Kirshes' home and personal belongings and made conscious, deliberate decisions not to take any corrective action. As this Court observed in *County of Sacramento v. Lewis*, ___ U.S. ___, 118 S. Ct. 1708, 1720, 140 L.Ed.2d 1043 (1998):

> "*** When such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking. ***"

HPD has also disregarded for more than ten (10) years the violations of the 7A Judgment that the Kirshes repeatedly complained of.

The District Court dismissed the Kirshes' allegations respecting not only the City's unconstitutional implementation of the 7A Judgment in this case and others, but also the averments that it was failing to comply with the terms, conditions and restrictions in the 7A Judgment and statute as part of its decision not to ever allow the Kirshes to regain control of their property, but also of the broader policy that it was using the 7A program to unconstitutionally take properties from their rightful owners in violation of owners' due process rights and right to just compensation. In so doing not only were the decisions of this Court respecting the applicable standards not followed, but the also this Court's decision that a heightened pleading standard is not applicable to a 1983 complaint. *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168-69 (1993).[55]

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[55] The proposed Amended Complaint was drafted to over come the District Court's objections to the sufficiency of the pleadings.

B. THE LOWER COURTS' RULINGS WITH RESPECT TO EXHAUSTION, FINALITY, RIPENESS, TAKING AND STANDING ARE CONTRARY TO AND INCONSISTENT WITH THE DECISIONS OF THIS COURT

The lower courts held that with respect to the Kirshes' claims that their personal property had been taken and their home leased out to strangers in violation of their rights to substantive and procedural Due Process and to Just Compensation that the Kirshes had to first exhaust the state's remedies. In so holding, the lower courts disregarded decisions of this Court that exhaustion is not required under Section 1983. *Heck v. Humphrey*, 512 U.S. 477, 481, 483 (1994); *Monroe v. Pape*, 365 U.S. 167, 183 (1961). The issues rather are whether pre-deprivation or post-deprivation procedures were available and their adequacy. For example, in *Zinermon v. Burch*, 494 U.S. 113, 127-39 (1990) this Court held that post-deprivation remedies satisfy Due Process requirements only where pre-deprivation are impossible or impractical, and the possibility of erroneous deprivation unforeseeable.[56] Also disregarded was this Court's decision in *United States v. James Daniel Good Real Property*, 510 U. S. 43, 48-62 (1993) that the seizure of a home without pre-notice and a hearing absent the most exigent circumstances is a Due Process violation even where otherwise adequate post-deprivation remedies are available. Here the post-deprivation remedies are clearly inadequate.

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[56] Had the 7A Judgment been strictly complied with the 7A Administrator would have had to obtain prior court approval to remove the Kirshes property since it was not the original emergency work that had been authorized and the cost was likely to and did exceed the $3500.00 limitation. Also once the vacancy was created in October, the court had to be notified after 30 days that these rooms were vacant. While Samms denied any knowledge of what Weiss was doing, she did admit that she inspected the property after first reading in the monthly report that he was removing property from the ground floor rooms. It is likely that the compliance agreement or in a communication with HPD that she or some other City official, *e.g.*, the building inspector who accompanied Samms, was told his intent to clean out the ground floor rooms and lease them out.

The lower courts also held that City's keeping of their property in 7A Administration and the leasing out of their home were merely temporary takings lacking the finality to be ripe and actionable. But this Court has long recognized that temporary takings which deny the property owner of all use of his property fall within the Clause and require just compensation. *See, e.g., First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, Ca.*, 492 U.S. 304, 318 (1987). Here the Kirshes have been denied all use and personal benefit of their property, its income and there home since 1988 and if, as alleged, the City's true intent is never to return their property to them, the taking then is permanent.[57] Such a result can not be said to be within the zone of their reasonable investment expectations since the 7A statute clearly contemplates return of control of the property to the owners immediately after the emergency repairs are made and otherwise required the property while under 7A Administration to be managed in strict compliance with the 7A Judgment and statute, with due regard for the owners' rights. (The 7A statute also doesn't provide for either the taking of property, real or personal, nor depriving the owners of the use and enjoyment of their home.)

Finally, the lower court's holding that the Kirshes lack standing to challenge the constitutionality of the 7A statute on its face or as applied is incomprehensible in light of the many decisions of this Court that injury in fact is the basic requirement for standing. *See generally, e.g., Bennett v. Spear*, 520 U.S. 154, 117 S. Ct. 1154, 1161-61, 137 L.Ed.2d 281 (1997). The Kirshes had been harmed, are being injured on an on-going basis and are continuing to be injured by the 7A Judgment and the actions complained of.

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[57] "Finality" for the purposes of determining if there has been a taking usually refers to a final agency decision. *See Sutum v. Tahoe Reg. Plan. Agency*, 520 U.S. 154, 117 S. Ct. 1159, 137 L.Ed.2d 980, 992-93 (1997). Also required to be considered in connection with the issues of ripeness, finality and exhaustion is the harm being suffered by the Kirshes. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 152-54 (1967). Here the Kirshes have been deprived for more than ten years of all personal use and benefit of their property's income and use and enjoyment of their home and have been impoverished and have suffered significant deprivations as a result.

III.

THE DECISION THAT THE PUNISHMENT IS NOT CONTRARY TO DUE PROCESS AND IN VIOLATION OF THE EIGHTH AMENDMENT IS INCONSISTENT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS AND RAISES ISSUES WHICH THIS COURT SHOULD RESOLVE

The Kirshes claimed that the punishment imposed on them violated Eight Amendment limitations that punishment[58] not be cruel and unusual or excessive. They also challenged under the Due Process Clause the constitutionality of the imposition of a term of punishment under a statute that set forth no limit or range, but left it up to the discretion of the court and the imposition of a term of punishment that had no definite end.

With respect to the latter issue, the decision below is inconsistent with Third and Ninth Circuits which have held that punishment must come to an end at the completion of a set term. *Sample v. Decks,* 885 F.2d 1099, 1108 (3rd Cir. 1989); *Haygood v. Younger,* 769 F.2d 1350, 1354-58 (9th Cir. 1985) (en banc), *cert. denied,* 478 U.S. 1020 (1986). Here though the initial term of extended administration to punish the Kirshes was for "not shorter than five years," the term of punishment on its face had no set end or term. Now, after ten (10) years, the extended term has still not ended and, according to the City, the Kirshes must apply and justify its termination, a requirement not set forth in either the 7A statute or the 7A Judgment. In *State v. Huelsman,* 588 P.2d 394, 405 (Haw. 1988), the court declared a state statute unconstitutional where it gave the sentencing court full discretion to set the length of punishment without statutory guidelines or limits. The 7A statute has the same infirmity and the extended term of 7A Administration imposed as a punishment, with the contempt punishment of being

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[58] Given the purpose, severity and disproportionality of the punishment imposed to the acts of tenant harassment, the sanction was clearly penal in nature. *See, e.g., Austin v. United States,* 509 U.S. 602, 609-10 (1993); *United States v. Halper,* 490 U.S. 435, 442-50 (1989); *Ballew v. Georgia,* 435 U.S. 223, 229 (1978); *Baldwin v. New York,* 399 U.S. 66, 68-69 (1970).

barred from going ½ mile of the building, has no set end. The court here had full and uncircumscribed discretion to impose a term as it saw fit and the one imposed has no fixed and definite end.

Whether a remedial statute containing a provision for punishment must comply with traditional Due Process requirements respecting fair notice of the proscribed conduct and the type, duration and maximums allowed as punishment for each type of proscribed conduct according to its gravity,[59] is an important issue this Court which should address.[60] Here the Kirshes' being deprived of their property and its income,[61] being barred from their home for more than ten years lacks any proportionality to the acts of tenant harassment that they were charged with. *See generally, United States v. Bajakajian*, ___ U.S. ___, 118 S. Ct. 2028, 2036-38, 141 L.Ed.2d 314 (1998); *Austin v. United States*, 509 U.S. 602, 609-10 (1993). In addition there is no legislative determination as to the length and exact nature of the appropriate punishment or the factors to be applied. *Cf. Solem v. Helm*, 463 U.S. 277, 290 (1983) ("Reviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishment for crimes"). Here punishment was arbitrarily imposed—*i.e.*, without regard to any statutory standards or guidelines!

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[59] *See generally, Bouie v. City of Columbia*, 378 U.S. 347, 351-56 (1964); *see also Giaccio v. Pennsylvania*, 382 U.S. 399 (1966); *Baggett v. Bullitt*, 377 U.S. 360 (1964); *A.B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 239 (1925).

[60] The District Court in holding that the Eighth Amendment did not apply erroneously assumed that the Kirshes could themselves correct the conditions that led to the imposition of 7A Administration when they could not: they were barred from the property and prohibited from interfering with its management. In addition, the District Court ignored the fact that those conditions had long before been corrected.

[61] Denying the Kirshes any personal use and benefit of their property's income is equivalent to a confiscation, fine or forfeiture.

CONCLUSION

This case represents a governmental program of questionable constitutional validity that has gone seriously awry and has resulted in egregious violations of fundamental constitutional property and personal rights. What happened to Kirshes is shocking and disturbing. This Court should grant the Kirshs' Petition for a Writ of Certiorari to clarify the law and provide appropriate guidance to the federal courts below and in other circuits.

Dated: September 14, 1998

Respectfully submitted,

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Counsel of Record
for Petitioners

APPENDIX A

(Cite as: 1998 WL 536973 (2nd Cir. N.Y.))

NOTICE: THIS IS AN UNPUBLISHED OPINION. Use FI CTA2 s 0.23 for rules regarding the publication and citation of unpublished opinions.

NOTE: THIS OPINION WILL NOT BE PUBLISHED IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

Mara KIRSH and Joseph Kirsh, Plaintiff-Appellant,
v.
CITY of NEW YORK, The Commissioner of the Department of Housing Preservation and Development of the City of New York, David Bradley Management Co., David Weiss, and Sheila Samms, Defendants-Appellees, Debbie Leung, John Wells, Jane and John Doe, Defendants.

No. 97-9059.

United States Court of Appeals, Second Circuit.

June 12, 1998.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 12th day of June one thousand nine hundred and ninety-eight.

Appearing for Appellants: Richard P. Caro, Riverside, Illinois.

Appearing for Appellees: Julian L. Kalkstein, New York, New York (Jeffrey Friedlander, Acting Corporation Counsel, and Larry A. Sonnenshein, on the brief), for the City of New York, the Commissioner of the Dept. of Housing Preservation & Development, and Sheila Samms. Steven R. Harris, New York, New York for David Bradley Management Co. and David Weiss.

Present: JAMES L. OAKES, THOMAS J. MESKILL, JOSE A. CABRANES, Circuit Judges.

SUMMARY ORDER

SWEET

*1 ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of said District Court be and it hereby is AFFIRMED.

Appellants Mara and Joseph Kirsh, the owners of real property at 239 Elizabeth Street, New York, New York, brought this action in the district court under 42 U.S.C. § 1983, alleging federal and state constitutional violations and state law torts in connection with the court-ordered administration of their property under Article 7A of the New York Real Property and Proceedings Law, and challenging the constitutionality of that statute. They now appeal the district court's dismissal of their federal causes of action and its denial of leave to amend their complaint.

Having carefully considered all of the appellants' arguments on appeal, we AFFIRM the judgment of the district court in its entirety, substantially for the reasons stated in its opinions below, see Kirsh v. City of New York, 1995 WL 383236 (S.D.N.Y. June 27, 1995), 1995 WL 679242 (S.D.N.Y. Nov.15, 1995), and 1997 WL 375684 (S.D.N.Y. July 7, 1997).

APPENDIX B

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Not Reported in F.Supp.

(Cite as: 1995 WL 383236 (S.D.N.Y.))

Mara KIRSH and Joseph Kirsh, Plaintiffs,

v.

CITY OF NEW YORK, the Commissioner of the Department of Housing Preservation and Development of the City of New York, David Bradley Management Co., David Weiss, Debbie Leung, John Wells, Sheila Samms, Jane and John Doe, Defendants.

No. 94 Civ. 8489 (RWS).

United States District Court, S.D. New York

June 27, 1995.

Richard P. Caro, New York City (A. Lawrence Washburn, Jr., William A. Gerard, of counsel), for plaintiff.

Paul A. Crotty, Corp. Counsel of the City of New York, New York City (Gabriel Taussig, Virginia Waters, Asst. Corp. Counsel, of counsel), for municipal defendants.

OPINION

SWEET, District Judge.

*1 The City of New York (the "City"), Commissioner of the Department of Housing Preservation and Development of the City of New York (the "HPD") and Shiela Samms ("Samms") (collectively the "City defendants") have moved for judgment pursuant to Rule 12(b)(6) of the Fed.R. of Civ.Proc. to dismiss the complaint of Plaintiffs Mara and Joseph Kirsh ("the Kirshes"). The Kirshes

brought suit pursuant to 42 U.S.C. § 1983 against the City defendants and administrators appointed under Article 7A of the New York Real Property Actions and Proceedings Law ("Art. 7A") of the State of New York: David Weiss, Debbie Leung, John Wells, David Bradley Management Company, and John and Jane Doe (the "7A administrators"). For the reasons set forth below, the motion is granted except as to certain of the individual defendants.

The Parties

The Kirshes, both citizens of the State of New York, are joint owners and landlord of a multiple dwelling located at 239 Elizabeth Street, New York, New York ("the property").

Defendant City of New York is a municipal corporation and public body amenable to suit brought under 42 U.S.C. § 1983. See Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 56 L.Ed.2d 611, 98 S.Ct. 2018 (1978).

Defendant HPD Commissioner is an agent and officer of the City of New York and chief executive of the HPD.

Defendant Samms is employed by the HPD and, as part of her official duties, oversees the management of 7A administrators who are appointed by the court under Art. 7A.

Defendant David Bradley Management ("DBM") has its principal offices at 55 Sheridan Avenue, Mt. Vernon, New York. DBM engages in the business of managing real estate.

Defendant John Wells ("Wells") served as 7A administrator of the property from March 1988 until approximately October 1990.

Defendant Debbie Leung ("Leung") served as 7A administrator of the property from approximately October 1990 until July 1992.

Defendant David Weiss ("Weiss") is a principal of Defendant DBM and current 7A administrator of the property. Weiss has served as the 7A administrator of the property since his appointment in July 1992.

Defendants John and Jane Doe are those officers, agents and representatives of the City and the HPD who are responsible for and oversee the management of properties under Art. 7A proceedings and who act under color of law and under the City's authority and the HPD Commissioner's supervision.

Prior Proceedings and Facts

During 1987, the HPD instituted an in rem action against the property pursuant to Art. 7A due to conditions threatening the health and safety of tenants and the belief that the Kirshes were harassing tenants. On March 1, 1988 Judge Lewis R. Friedman of the Housing Division of the Civil Court, County of New York, issued an order (the "March 1988 Order") placing the property under 7A administration and appointing Wells as the first administrator.

Pursuant to § 778(1) and the terms of the March 1988 Order, the 7A administrator may collect and increase, or decrease rent, enter into contracts for repairs, rent or lease vacant units with the permission of the court, and, in general, assume all responsibilities of the landlord for the duration of the administration. The March 1988 Order also requires the administrator attend the HPD's Counseling and Assistance Unit performance review meetings and receive certification from the HPD's Management Alternative Training Program. The administrator is also required to appear regularly before the court to report the details of his management of the property, and submit monthly financial statements and reports to the HPD's 7A Counseling and Assistance Unit.

*2 Based upon its findings that the Kirshes harassed tenants, the Housing Court ordered that the property be placed under 7A administration for at least five years, but allowed the Kirshes, and other interested parties, the right to move for earlier termination of the administration to be granted upon a sufficient showing (March 1988 Order, para 17). The Housing Court also allowed the Kirshes to continue to occupy their apartment and store front without paying rent.

The March 1988 Order has remained in effect, modified in part by changes in the appointed administrators and the terms of the Contempt Order[1] issued by Judge Friedman in August 1988 which enjoined Mara Kirsh from approaching within one block of the property. Since the property was placed under 7A administration, the Kirshes' conduct towards former and present tenants has been the subject of criminal proceedings.[2]

In October 1994 the Kirshes learned from Weiss that sometime in 1994 their apartment and storefront had been entered and then rented or leased to an unknown third party and that their personal property had been examined and removed. These actions were taken with the prior approval of Samms, but without the Kirshes' prior knowledge or court authorization.

The Kirshes seek declaratory, mandatory, and injunctive relief enjoining further implementation of the March 1988 Order and the contempt order of August 1988, restoration of their apartment and store front, an accounting and return of all their personal property removed from their home, an accounting of all monies obtained from rentals and from dispositions of any of their property, and $10 million dollars in compensatory and consequential damages, and punitive or exemplary damages.

Discussion

In reviewing a motion to dismiss under Fed.R.Civ.P. 12(b)(6), the trial court's function is, "to assess the legal feasibility of the

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[1] The criminal contempt order of August 1988 was upheld on appeal in Schuyler ex rel. Kirsh v. Grimaldi, 186 A.D.2d 414, 589 N.Y.S.2d 9, (1st Dept.1992); HPD v. Kirsh, 90-267 (1st Dept.1991), and Kirsh v. Michetti, 787 F.Supp. 403 (S.D.N.Y.1992).

[2] Joseph Kirsh was indicted for weapons possession. Mara Kirsh was convicted of perjury for her testimony at Joseph's weapons possession trial. People v. Kirsh, 176 A.D.2d 652, 575 N.Y.S.2d 306 (1st Dept.1991). Both plaintiffs' conviction for conspiracy to mail threatening communications, mailing threatening communications, and possession of firearms, were recently upheld in United States v. Kirsh, 1995 U.S.App. Lexis 11778.

complaint, not to assay the weight of the evidence which might be offered. . . ." Geisler v. Petrocelli, 616 F.2d 636, 639 (2d Cir. 1980). A motion to dismiss should not be granted unless, after viewing the plaintiff's allegations in a favorable light, "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Walker v. City of New York, 974 F.2d 293, 298 (2d Cir.1992) (quoting Ricciuti v. New York City Transit Auth., 941 F.2d 119, 123 (2d Cir.1991)). The City Defendants allege the Kirshes cannot prove such a set of facts because the complaint fails to state a sufficient basis for their liability.

First and Third Claims for Violations of the Fourth, Ninth and Fourteenth Amendments

The Kirshes have asserted a deprivation of their Fourteenth Amendment rights to due process by alleging a denial of notice and an opportunity to be heard before their apartment was entered and leased to a third party in October 1994. The alleged lack of notice, notwithstanding any opportunity they might have had to challenge the entry, constitutes a denial of the right to due process. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950) (Notice is a "fundamental" requirement of the Due Process Clause). The alleged acts, performed without the Kirshes' authorization, also constitute a violation of their Fourth Amendment rights. See Camara v. Municipal Court of City & County San Francisco, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967) (Fourth Amendment applies to searches and seizures in the civil context).

*3 After stating the requisite denial of their constitutional rights, the Kirshes must then state how each of the three City Defendants caused the denial. Because the basis for liability of the City, Commissioner of the HPD, and Samms differ, the sufficiency of the pleadings against each deserves separate discussion.

A. Motions to Dismiss on Behalf of the City are Granted

Although the Section 778(7)[3] immunizes the City from liability, the City may be held liable under § 1983 for the actions of its agencies such as the HPD. See Monell, 436 U.S. 658. Although a municipality may not be held liable under the theory of respondeat superior, the City is responsible for injuries proximately caused by its policies or customs, whether formal or informal. Id. at 691-95. See also Oklahoma City v. Tuttle, 471 U.S. 808, 829, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985) (Brennan, J., concurring).

To survive a motion to dismiss a § 1983 complaint against the City, it must allege: "(1) an official policy or custom that (2) causes the plaintiff to be subjected to (3) a denial of a constitutional right." Batista v. Rodriguez, 702 F.2d 393, 397 (2d Cir.1983). Furthermore, the claim must state that the deprivation of their constitutional rights was the result of a municipal policy or custom's "deliberate indifference" to Fourth, Ninth and Fourteenth Amendment rights. Canton v. Harris, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989).

The Kirshes claim that municipal liability may be derived from the actions of both Samms,[4] as an employee of a municipal agency, and Weiss, the 7A administrator during 1994. In their assertions, they have failed to state that either Samms' or the 7A administrators' "edicts or acts may fairly be said to represent official policy [that] inflict[ed] the injury that the government as an entity is responsible under section 1983." Monell, 436 U.S. at 694.

The Kirshes have failed to satisfy the requisite elements of a Monell claim for the City to be held liable for Samms' role in the

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[3] Section 778(7) provides, "[n]o city or county specified in . . . this article shall be liable to any party, including such administrator or the owner, for injury to persons or property by reason of conditions of the premises or the acts or omissions of such administrator, except that when the city of New York is appointed administrator. . . ."

[4] Without defining the exact scope of Samms' responsibilities as an HPD employee, the complaint states merely that Samms "oversees the 7A Administrator's management of the Property. . . ."

entry, removal and rental of their property. Although they have asserted a denial of their constitutional rights caused in part by Samms' approval, they have failed to state that Samms' involvement was representative of a municipal policy or custom. The complaint does not state that Samms' actions, as an HPD employee, are indicative of an existing policy or custom, or that Samms herself is competent to promulgate municipal policies or customs. By failing to allege the existence of an unconstitutional policy or custom, the first element of a municipal § 1983 claim established by Batista, the Kirshes have failed to establish any basis for the City's liability. See also Rochez v. Mittleton, 839 F.Supp. 1075 (S.D.N.Y.1993).

To recover from the City, the claims must assert evidence in the complaint of the municipal policy or custom "deliberately indifferent" to Fourth, Fifth, Ninth, and Fourteenth Amendment rights. See Dwares v. City of New York, 985 F.2d 94 (2d Cir.1993). Moveover, "[t]he mere assertion . . . that a municipality has such a custom or policy is insufficient in the absence of allegations of fact tending to support, at least circumstantially, such an inference." Id. at 100 (action against City for police officer's conspiracy was dismissed because the complaint "failed adequately to plead a custom or policy on the part of the City contributing to [plaintiff's] injuries.") Id.; see also Brown v. Co. Chambers # 2023, 1993 U.S.Dist. Lexis 10995, 5 (where pro se plaintiff's claims against the City which failed to allege the existence of an unconstitutional policy or custom was dismissed).

*4 In asserting Weiss' involvement in the unauthorized entry and rental of their apartment and store front, and removal of their personal property, the Kirshes have also failed to state a municipal policy or custom for which the City may be held liable. Unlike Samms, Weiss' authority is limited to managing the property, and, therefore, he cannot be regarded as a potential influence on city policy or custom.

7A administrators such as Weiss are not considered employees of the City or State even though they are authorized by state law to manage the property and receive compensation from its revenue.

Therefore, the Kirshes' claim must state another theory upon which the acts of 7A administrators may be ascribed to the City. Lugar v. Edmunson Oil Co., 457 U.S. 922, 931, 102 S.Ct. 2744, 2750, 73 L.Ed.2d 482 (1982) (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 150, 90 S.Ct. 1598, 1604, 26 L.Ed.2d 142 (1970)).

The acts of 7A administrators or the Does do not rise to the level of municipal action merely because Samms offered her approval. Because "a State's mere acquiescence in a private action [does not convert] that action into that of the State," the Kirshes' claims lacks sufficient foundation for municipal liability. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 164, 98 S.Ct. 1729, 56 L.Ed. 2d 185 (1978).

Further, the Kirshes do not state any theories or evidence that the deprivation of their constitutional rights is indicative of a system-wide failure in 7A administration. Although the HPD was involved in the recommendation, training, and counselling of the 7A administrators, the claim does not assert that the City was in any way "deliberately indifferent" in connection with any of these functions. Thus, the Kirshes have failed to state any theory upon which the acts of 7A administrators or those authorized by them may impute City liability.

For the reasons stated above, the first and third claims against the City are dismissed.

B. Motions to Dismiss on Behalf of the Commissioner of the HPD are Granted

The first and third claims against the HPD Commissioner must also be dismissed because the Kirshes have failed to state any personal involvement that the Commissioner might have had in the entry, removal, and rental of their property. "[P]ersonal involvement is a prerequisite to an award of damages under § 1983." McKinnon v. Patterson, 568 F.2d 930, 934 (2d Cir.1977), cert. denied, 434 U.S. 1087, 98 S.Ct. 1282, 55 L.Ed.2d 792 (1978). Thus, the first and third claims against the Commissioner of the HPD are dismissed.

C. Motions to Dismiss on Behalf of Samms are Denied

In a § 1983 action, the claim must allege "(1) a person (2) acting under color of state law (3) subjected the plaintiff or caused the plaintiff to be subjected (4) to the deprivation of a right secured by the Constitution or laws of the United States." Oklahoma City v. Tuttle, 471 U.S. 808, 829, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985) (Brennan, J., concurring); Parratt v. Taylor, 415 U.S. 527. 535, 101 S.Ct. 1908, 1913 (1981).

*5 The Kirshes have asserted that their constitutional rights under the Fourth, Ninth, and Fourteenth Amendments were violated by stating that their home was entered, and their property removed without prior notice or consent. They have also alleged the requisite personal involvement of Samms who acted under color of state law when she offered her approval to acts which constituted the violation of the Kirshes' constitutional rights. McKinnon v. Patterson, 568 F.2d at 934. Therefore, the first and third claims against Samms shall not be dismissed at this time.

Second Claim for Violations of the Just Compensation Clause of the Fifth Amendment is Dismissed

The Kirshes claim that the City Defendants have violated their Fifth Amendment rights in contravention of § 1983 by taking or depriving them of their home and property without providing just compensation.[5] The takings claim concerns: (1) the 7A administration of their property, pursuant to the March 1988 Order and (2) the rental of the Kirshes' apartment and storefront and removal of their personal property in October 1994.

State interference with property interests that requires compensation under the Fifth Amendment may be categorized as either per se takings, which involve a permanent physical occupation, or

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[5] The Fifth Amendment provides in relevant part: "Nor shall private property be taken for public use, without just compensation." This provision applies to States through the Fourteenth Amendment. Chicago, B. & Q.R. Co. v. City of Chicago, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897).

regulatory takings, when a regulation significantly affects a property owner's economic interest. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S.Ct. 2886, 2893, 120 L.Ed.2d 798 (1992). Because the imposition of 7A management does not constitute a permanent, physical occupation characteristic of a per se taking, the takings claim must be classified as a regulatory takings claim. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) (per se taking claim requires permanent physical occupation of the claimant's property).

Although Art. A was declared a legitimate exercise of police power in Himmel v. Chase Manhattan Bank, 47 Misc.2d 93, 262 N.Y.S.2d 515 (Civ.Ct.1965), the Kirshes allege that the statute constitutes a regulatory taking because it "goes too far" in diminishing the value or usefulness of private property. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922).

A claim that a regulation amounts to a taking for which compensation is due must state the extent that the regulation has frustrated the reasonable investment-backed expectations of the property owner. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978); see also Kaiser Aetna v. United States, 444 U.S. 164, 175, 100 S.Ct. 383, 62 L.Ed. 2d 332 (1979). Recovery is limited to owners who bought their property without knowledge of the regulation, and who relied on the regulation's non-existence. Creppel v. United States, 41 F.3d 627, 631 (Fed.Cir.1994).

The Kirshes, who acquired the property in December 1979, approximately fifteen years after the initial implementation of Art. 7A, had constructive knowledge of its requirements of landlords, and its effects on their investment in the property. Foreknowledge of the regulation's terms and the penalties associated with its violation indicates that the Kirshes assumed a risk of the economic loss caused by its implementation. Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal., 508 U.S. 602, 113 S.Ct. 2264, 2291-92, 124 L.Ed.2d 539 (1993). Because

the risk of loss was, presumably, allocated at the time the Kirshes purchased the property, "[c]ompensating [them] for a 'taking' would confer a windfall." Creppel, 41 F.3d at 632. Without establishing a frustration of reasonable investment-backed expectations, the Kirshes have failed to assert a denial of their Fifth Amendment rights for the temporary denial of full ownership and withholding of revenue from the property caused by the 7A administration.

*6 Moreover, the charge that the continuation of the 7A administration and deprivation of income from the property constitute a de facto permanent taking also fails. The protracted 7A administration imposed by the Housing Court may demonstrate an extensive application of the statute's provisions, but it does not qualify as a per se taking. The 7A administration does not constitute a permanent physical occupation because the City has not permanently extinguished the Kirshes' property rights. Dawson v. Higgins, 197 A.D.2d 127, 134-35, 610 N.Y.S.2d 200 (1st Dept.1994).

When landowners voluntarily rent their property, and consequently submit to municipal regulations, they are not deprived of their property rights. Yee v. City of Escondido, Cal., 503 U.S. 519, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992) (an ordinance regulating the rentals to mobile home owners did not amount to a per se taking because it merely regulated the landowners' activities if they voluntarily rented to mobile home owners, but did not compel them to do so). It is the Kirshes' own decision to act as landlord of the property, not State or City compulsion, which has resulted in the continued application of Art. 7A. Because the Kirshes retain the right to move for termination of the 7A proceedings, the temporary deprivation of full ownership is not a matter of City or State compulsion.

Moreover, the Kirshes have not sufficiently alleged that Art. 7A constitutes a regulatory taking which "denies an owner economically viable use of his land." Agins v. City of Tiburon, 447 U.S. 255, 260, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980). The complaint merely cites the hardships which the 7A administration has imposed upon them without stating that the regulation effectively prevents them from yielding their expected income from the property.

The Kirshes' further assertion that the rental of their apartment and store front constitutes a per se taking is also without merit because the City has not indicated its intent to appropriate or permanently occupy the property. Only when government action permanently deprives the property owner of all three rights associated with ownership, i.e., the rights to possess and exclude, use, and dispose, may the action be considered a per se taking. Southview Assoc., Ltd. v. Bongartz, 980 F.2d 84, 93 (2d Cir.1992) (citing Loretto, 458 U.S. at 435). "Absolute exclusivity of the occupation, and absolute deprivation of the owner's right to use and exclude others from the property [are considered] hallmarks of a physical taking." Id.

The alleged unauthorized rental of the apartment and storefront do not qualify as a per se taking because the rental to a third party does not constitute a permanent occupation. As stated above, where a claimant may recover property upon the expiration or termination of a tenancy, there can be no finding of a permanent, physical occupation which constitutes a per se taking. See Dawson, 197 A.D.2d at 134-35 (quoting Rent Stabilization Ass'n of N.Y. City v. Higgins, 83 N.Y.2d 156, 172, 630 N.E.2d 626, 608 N.Y.S.2d 930 (1993)) (in context of rent control, where tenancies were not perpetual or of indefinite duration, the regulation did not amount to a permanent, physical occupation required to prove a taking). The rental and dispossession of the Kirshes' property lack the permanency characteristic of a per se taking. Instead, they are the result of a municipal land use decision made under the authority of Art. 7A.

*7 The Kirshes' Just Compensation Clause challenge to the decision to rent the apartment and remove their personal property is not ripe for adjudication because it does not satisfy the two-part test set forth in Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). First, the Kirshes must indicate that the City has rendered a "final decision" affecting their property interest. Id. at 194. Second, they must allege that they have applied for the available state remedy which failed to provide them with adequate

compensation. Id. quoting Regional Rail Org. Act Cases, 419 U.S. 102, 124-35, 95 S.Ct. 335, 349, 42 L.Ed.2d 320 (1974); see also Southview, 980 F.2d at 95; see also Kinzli v. City of Santa Cruz, 818 F.2d 1449, 1454, modified on other grounds, 830 F.2d 968, (9th Cir.1987), cert. denied, 484 U.S. 1043, 108 S.Ct. 775, 98 L.Ed.2d 861.

The Kirshes' claim fails to state either of the requisite elements. The Just Compensation clause of the Fifth Amendment does not insure against deprivation of property by the state; rather, it secures a right to just compensation after the state has caused such a deprivation. Williamson, 473 U.S. at 194, citing Hodel v. Virginia Surface Mining & Reclamation, 452 U.S. 264, 297 (1981). The Kirshes do not indicate any infringement of their rights under NYRPAPL § 778(1) and 779 for an accounting by the administrator, or their right under the March 1988 Order to apply for full restoration of the property upon showing of sufficient reason. Further, they do not allege the unavailability of any "reasonable, certain and adequate provision for obtaining compensation." Williamson, 473 U.S. at 194 quoting Regional Rail Org. Act Cases, 419 U.S. at 124-25, 95 S.Ct. at 349.

Upon learning from Weiss that their apartment and storefront had been rented and personal property removed, the Kirshes' first opportunity to seek just compensation is in Housing Court, where the 7A proceedings are currently pending. Until they obtain a "final decision," denying them of their property without just compensation, their takings claim for the rental of their apartment and dispossession of their personal property is not ripe for adjudication.

For the reasons stated above, the claims against City Defendants for taking their property within violation of the Just Compensation Clause are dismissed.

Fourth Claim Alleging Violations of the Eighth Amendment is Dismissed

The Eighth Amendment[6] insures against the imposition of cruel and unusual punishment and excessive fines. The Kirshes allege that entry, removal, and rental of their property, the denial of income from the property, and the denial to restoration of full ownership of the property upon completion of repairs constitute violations of the Eighth Amendment.

The Kirshes have failed to state an imposition of excessive fines because they have not stated any infringement of their rights under state law to move in Housing Court to alleviate the imposition of penalties. The Kirshes maintain the right to an accounting of the property's management pursuant to NYRPAPL § 778(1) and 779, and the right to move pursuant to the March 1988 Order's provision that the 7A administration be terminated upon a showing of sufficient reason.

*8 The Kirshes may not rely on the Excessive Fines Clause to challenge the imposition of fines which are not punitive in nature. United States v. Mongelli, 2 F.3d 29, 30 (2d Cir.1993). The Eighth Amendment does not apply to sanctions intended to secure compliance, such as the placement of property under receivership for the purpose of correcting conditions dangerous to health or safety.

Further, where a claimant has the ability to mitigate the accrual of fines, there is no violation of the Eighth Amendment. See Kraebel v. Michetti, 1994 WL 455468, *11 (S.D.N.Y.) citing Seril v. New York State Div. of Hous. & Community Renewal, 205 A.D.2d 347, 347, 613 N.Y.S.2d 152 (1st Dept.1994). In Seril the court held that administrative proceedings against a landlord did not violate the Eight Amendment when ". . . it was, and continues to be, a matter of their own choice to do what is necessary to correct the conditions that led to the findings of harassment and thereby lift the restrictions imposed." Seril, 205 A.S.2d at 347. The Kirshes' failure to demonstrate to the Housing Court that they

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[6] Robinson v. California, 370 U.S. 660, 666, 82 S.Ct. 1417, 1420 (1962).

should be restored full ownership of the property, evidenced by their recent convictions for harassing former and current tenants, precludes this Court from reviewing whether the continuation of 7A proceedings against the property constitutes an excessive fine.

Fifth and Sixth Claims Requesting Constitutional Review of Art. 7A are Dismissed in Part

Finally, the Kirshes contend that Art. 7A is unconstitutional because it violates the Just Compensation Clause of the Fifth Amendment, and Due Process Clause and Equal Protection Clause of the Fourteenth Amendment.

To challenge the constitutionality of the State statute, the Kirshes must establish standing. Article III of the Constitution limits the federal judiciary's power to resolving actual "cases or controversies" before the court. Allen v. Wright, 468 U.S. 737, 750, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984). Thus, the Kirshes' complaint must state an actual or threatened injury caused by the statute's allegedly unconstitutional provision, and that the injury could be redressed by the requested review of the statute. The complaint alleges sufficient facts that provide standing to challenge the statute's validity under the Equal Protection Clause, but lack the sufficiency required for standing to challenge the statute's validity under the Just Compensation Clause and the Due Process Clause.

For the reasons discussed in the takings section above, the Kirshes do no have standing to challenge Art. 7A under the Just Compensation Clause. By failing to assert the rendering of a "final decision" concerning their interests in the property, and insufficiently alleging the absence of a constitutionally sufficient state remedy, the Kirshes' lack standing to challenge Article 7A's validity under the Just Compensation Clause.

Similarly, the Kirshes lack standing to challenge the constitutionality of Article 7A under the Due Process Clause because the claim does not allege a denial of their Fourteenth Amendment rights to notice or an opportunity to be heard in connection with the Article

7A proceedings. Nor do the Kirshes allege a denial of their rights to move for an accounting or for termination of the 7A management. Without pointing to deficiencies in Art. 7A itself, or municipal policies or customs associated with its implementation, the Kirshes' lack standing to challenge its constitutionality.

*9 The Kirshes challenge Art. 7A's validity under the Equal Protection Clause as an unconstitutional infringement on their right to "pursue a lawful livelihood." Although the City Defendants cite Himmel v. Chase Manhattan Bank, 47 Misc.2d 93, 262 N.Y.S.2d 515 (Civ.Ct.1965) for the proposition that the constitutionality of Art. 7A has already been established, the equal protection challenge may still be asserted considering the fact that the court in Himmel upheld the statute as a legitimate use of police power thirty years ago without offering significant discussion.

Although the Kirshes may pursue their Equal Protection challenge, as private landlords they are not considered members of a suspect class. See Kraebel v. New York City Dep't of Hous. Preservation & Dev., 959 F.2d 395, 402 (2d Cir.), cert. denied, 113 S.Ct. 326, 121 L.Ed.2d 245 (1992).

The right of ownership is not recognized as a fundamental right entitled to strict scrutiny under the Equal Protection Clause. In fact, "States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular. . . ." Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 440, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). Thus, the Constitution merely requires that Art. 7A is "rationally related" to the valid state interests in public health and the need for adequate housing. Soberal-Perez v. Heckler, 717 F.2d 36, 41 (2d Cir.), cert. denied, 466 U.S. 929, 104 S.Ct. 1713 (1983). Finally, the Kirshes, whose claim involves property located in Manhattan, do not have standing to challenge the propriety of the Article's application to Suffolk County. When asked to review the constitutionality of a State law, the court may not look to situations or arguments that may be posited by a hypothetical third party. Gladstone v. Village of Bellwood, 441 U.S. 91, 100, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979).

Conclusion

For the reasons stated above, all claims against the City Defendants are dismissed, with the exception of the first and third claims against Samms. The claims challenging the constitutionality of Art. 7A under the Due Process Clause of the Fourteenth Amendment and the Just Compensation Clause of the Fifth Amendment are also dismissed. The Kirshes' claim that Art. 7A violates the Equal Protection Clause of the Fourteenth Amendment will not be dismissed at this time, but will be reviewed under a "rational basis" test.

Discovery will be completed by September 13, 1995 and the pretrial order filed September 27, 1995.

It is so ordered.

APPENDIX C

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Not Reported in F.Supp.

(Cite as: 1995 WL 679242 (S.D.N.Y.))

Mara KIRSH and Joseph Kirsh, Plaintiffs,
v.
CITY OF NEW YORK, The Commissioner of the Department of Housing Preservation and Development of the City of New York, David Bradley Management Co., David Weiss, Debbie Leung, John Wells, Sheila Samms, Jane and John Doe, Defendants.

No. 94 CIV. 8489 (RWS).

United States District Court, S.D. New York.

Nov. 15, 1995.

Richard P. Caro, New York City (A. Lawrence Washburn, Jr., William A. Gerard, of counsel), for Plaintiffs.

Paul A. Crotty, Corporation Counsel of the City of New York, New York City (Gabriel Taussig, Virginia Waters, Assistant Corporation Counsel, of counsel), for Municipal Defendants.

OPINION

SWEET, District Judge.

*1 The City of New York (the "City"), Commissioner of the Department of Housing Preservation and Development (the "HPD") and Sheila Samms ("Samms") (collectively the "City defendants") have moved for judgment pursuant to Rule 56 of the Fed. R. of Civ. Proc. to dismiss the Equal Protection challenge to Article 7A of the New York Real Property Actions and Proceedings Law,

N.Y. Real Prop. Acts. (McKinney 1979 & Supp. 1995) ("Art. 7A"). For the reasons set forth below, that motion is granted.

Parties

The parties, prior proceedings and facts are set forth in an earlier opinion of this court, familiarity with which is assumed. See Kirsh v. New York City, 1995 WL 383236 (S.D.N.Y. 1995). Only information related to the disposition of this motion is repeated below.

By Opinion of June 27, 1995 the Court, in relevant part, denied the City's motion to dismiss the Kirshes' Equal Protection challenge to Article 7A, stating that:

> Although the Kirshes may pursue their Equal Protection challenge, as private landlords they are not considered members of a suspect class. See Kraebel v. New York City Dep't of Hous. Preservation & Dev., 959 F.2d 395, 402 (2d Cir.), cert. denied, 113 S. Ct. 326, 121 L. Ed. 2d 245 (1992).
>
> The right of ownership is not recognized as a fundamental right entitled to strict scrutiny under the Equal Protection Clause. In fact, "States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular . . . ." Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 440, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982). Thus, the constitution merely requires that Art. 7A is "rationally related" to the valid state interests in public health and the need for adequate housing,. Soberal-Perez v. Heckler, 717 F.2d 36, 41 (2d Cir.), cert. denied, 466 U.S. 929, 104 S. Ct. 1713 (1983).

The June 27, 1995 Opinion denied the motion to dismiss the complaint against the City defendants on two grounds. The first was liability of 7(A) Administrator Samms under 42 U.S.C. § 1983 and the second was the Equal Protection challenge to Article 7(A).

On September 13, 1995 the City Defendants moved to dismiss the Complaint and for summary judgment on the grounds that

Samms lacked the personal knowledge required for liability under § 1983 and to dismiss the remaining Equal Protection claim. Oral argument was heard on October 13, 1995. At that argument, Plaintiffs' request in open court for additional discovery on the Equal Protection claim was denied. The Court postponed final argument on the portion of the motion relating to Samms until November 7,[1] and considered the motion on the Equal Protection motion fully submitted as of October 13. This Opinion, therefore, resolves only the Equal Protection portion of the City Defendants' motion.

Discussion

Standards for Summary Judgment

Summary judgment procedures, in accordance with Rule 56, facilitate the overall purpose of the Federal Rules of Civil Procedure, which are designed "to secure the just, speedy and inexpensive determination of every action." Fed. R. Civ. P. 1; Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986). Rule 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); Moller v. N. Shore Univ. Hosp., 12 F.3d 13, 15 (2d Cir. 1993).

*2 On a motion for summary judgment, all inferences to be drawn from the underlying facts and all doubts as to the existence of a genuine issue for trial must be resolved in favor on the party opposing the motion. Brody v. Town of Colchester, 863 F.2d 205, 210 (2d Cir. 1988). If, when "[v]iewing the evidence produced in the light most favorable to the nonmovant . . . a rational trier could not find for the nonmovant, then there is no genuine issue of

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[1] By agreement of the parties, the final argument on Samms' liability will be heard on November 22, 1995.

material fact and entry of summary judgment is appropriate." Binder v. Long Island Lighting Co., 933 F.2d 187, 191 (2d Cir. 1991). The substantive law identifies which facts are material, and "only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson, 477 U.S. at 248. In resolving a motion for summary judgment, a judge will not "weigh the evidence and determine the truth of the matter"; rather, the judge merely will "determine whether there does indeed exist a genuine issue for trial." Id. at 249.

The party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and identifying which materials "it believes demonstrate the absence of a genuine issue of for trial." Celotex Corp., 477 U.S. at 323; see Bay v. Times Mirror Magazines, Inc., 936 F.2d 112, 116 (2d Cir. 1991). If a motion for summary judgment is properly made, the burden shifts to the non-moving party to "set forth specific facts showing that there is a genuine issue for trial." Fed.R. Civ.P. 56(e); Anderson, 477 U.S. at 250. To defeat a motion for summary judgment, the non-movant must "do more than simply show that there is some metaphysical doubt as to the material facts" concerning those issues which the moving party has sustained its burden or those which the non-moving party itself bears the burden of proof. Matushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The non-movant must establish the existence of enough evidence such that a jury could return a verdict in his favor. See Anderson, 477 U.S. at 247-51, 106 S.Ct. at 2509-11. Entry of summary judgment indicates that under the governing law no reasonable jury could return a verdict for the losing party. Coach Leatherware Co. v. AnnTaylor, Inc., 933 F.2d 162, 167 (2d Cir. 1991).

City Defendants Have Established
a Rational Basis for Article 7(A)

Under the rational basis test, "a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to

justify it." McGowan v. Maryland, 366 U.S. 420, 426 (1961). See also Pennell v. City of San Jose 485 U.S. 1 (1987); Mass. Bd. of Retirement v. Murgia, 427 U.S. 307 (1976). Thus, to succeed on an equal protection challenge, "plaintiff bears the burden of demonstrating that no state of facts reasonably may be conceived to justify" the statute, Osipova v. HEAP, 1986 WL 3357 at * 2 (S.D.N.Y. 1986), while the state need only show that the statute in question, Art. 7A, is "rationally related to a legitimate governmental purpose" for it to be upheld as constitutional. See Soberal-Perez v. Heckler, 717 F.2d 36, 41 (2d Cir.), cert. denied, 466 U.S. 929, 104 S. Ct. 1713 (1983).

*3 In their complaint and briefs, plaintiffs make their equal protection challenge to Art. 7A by raising the specter of unconstitutionality, based on the alleged need for territorial uniformity in the application of laws, without more. Defendants have demonstrated to this Court the rational basis of this legislation and its connection to a legitimate governmental purpose.

The legislative history of Art. 7A reveals that the legislature approved receiverships as a means of addressing and remedying the problem of unsafe conditions in multiple-occupancy dwellings. See "Multiple Dwellings—Dangerous Conditions—Proceedings to Remedy" Chapter 909 Laws of N.Y., 1965. It is rational to believe, as the legislature did, that by permitting the tenants of buildings which fall below minimum standards of health and safety to pay their rents into a receivership rather than directly to the landlord, the recalcitrant landlord might thereby be prompted to make the necessary repairs and improvements on the property. Furthermore, it was rational for the legislature to apply this statute only to selected areas of the state, because of the housing problems and the concentration of multiple dwellings in these areas. Where the problems are not so severe, the strong remedy of a receivership may not be justified.

Plaintiffs challenge the fairness of this statute by questioning why it should be applied to some areas in the state and not to others. But where a statute is seen to have a reasonable basis, as this one does, there is no offense to the Constitution merely because the application of the law "is not made with mathematical

nicety or because in practice it results in some inequality." Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911). Furthermore, we have recognized for a long time that in New York, uniform statewide application of laws cannot only be ineffective but unjust. The logic of the court in Ahern v. Elder, 195 NY 493, 500 (1909), applies equally to the context of substandard housing regulation as it did to the context of voter registration:

> Unless the Legislature has the power to make such laws as shall be effective against local conditions which are productive of confusion, fraud, and disorder, the people are in danger of losing the very rights which the Constitution is designed to secure. If a registration law, to be constitutional, must be absolutely uniform in its application to every part of the state, it needs no argument to prove that it will be utterly ineffective in the large cities if framed according to the needs of rural communities, and grossly oppressive in many parts of the state if modeled upon the requirements of densely populated centers.

The legislature fashioned Art. 7A to meet the special problems of highly urbanized communities and applied the law where its need was most felt. With special reference to New York City, the legislature found that:

> . . . there exists in the city of New York multiple dwellings which contain the conditions hereinafter described and which endanger the life, health or safety of the occupants thereof. It is hereby further found that additional enforcement powers are necessary in order to compel the correction of such conditions and to increase the supply of adequate, safe and standard dwelling units, the shortage of which constitutes a public emergency and is contrary to the public welfare."

*4 The concentration of multiple dwellings in New York City remains high today as it was when 7(A) was first passed. (Joseph J. Salvo Aff.). The legislature has revised the law as recently as 1989, representing a confirmation of the continued need for such legislation. See N.Y. Real Prop. Act. § 779 (McKinney 1979 & Supp. 1995).

Distinctions based on geographic/demographic differences have been upheld by the courts if they are rational.

A New York licensing law applicable only to employment agencies in first and second class cities was upheld in People Ex Rel Armstrong v. Warden of City Prison of N.Y., 183 N.Y. 223, (1905), the court noting that "the evil which the Legislature may have in view in passing such laws may exist only in the great cities of the state, and have no existence in rural districts." Id. at 226. As noted in the June Opinion, the regulation in question, Art. 7A, has itself withstood a constitutional challenge, albeit not on equal protection grounds. As noted in the June Opinion, in Matter of Himmel v. Chase Manhattan Bank, 47 Misc. 2d 93 (NYC Civil Ct., New York Co. 1965), the court called Art 7A "a valid police power and a constitutional statute." Id. at 96.

The U.S. Supreme Court has stated that "the Equal Protection clause relates to equality between persons as such, rather than between areas, and territorial uniformity is not a constitutional prerequisite." McGowan v. Maryland, 366 U.S. 420, 427 (1960). To succeed in their Equal Protection challenge, plaintiffs here would need to allege and show that within the areas designated by the Legislature for application of Art.7A, the law had been applied in some discriminatory fashion, one which lacked any rational basis or connection to a legitimate governmental interest. They make no such allegation nor do they offer any such proof. The defendants have set forth a rational basis. This is sufficient.

Accordingly, the motion for summary judgment against plaintiffs is granted on the Equal Protection claim.

Conclusion

For the reasons stated above, the motion to dismiss the Equal Protection Challenge to Article 7A is granted.

The other motions remain sub judice and will be the subject of oral argument to be heard on November 22, 1995 at 10 AM.

It is so ordered.

APPENDIX D

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Not Reported in F.Supp.

(Cite as: 1997 WL 375684 (S.D.N.Y.))

Mara KIRSH and Joseph Kirsh, Plaintiffs,

v.

City of NEW YORK, The Commissioner of The Department of Housing Preservation and Development of The City of New York, David Bradley Management Co., David Weiss, Debbie Leung, John Wells, Sheila Samms, Jane and John Doe, Defendants.

No. 94 CIV. 8489(RWS).

United States District Court, S.D. New York.

July 7, 1997.

RICHARD P. CARO, ESQ. Attorney for Plaintiff By: A. LAWRENCE WASHBURN, JR., ESQ. WILLIAM A. GERARD, ESQ. Of Counsel

HON. PAUL A. CROTTY Corporation Counsel of the City of New York Attorney for Municipal Defendants By: GABRIEL TAUSSIG, ESQ. VIRGINIA WATERS, ESQ. Assistant Corporation Counsel Of Counsel

ROBERT SWEET, U.S.D.J.

*1 The defendant Sheila Samms ("Samms") has moved for summary judgment dismissing the complaint against her filed by plaintiffs Mara Kirsh and Joseph Kirsh (the "Kirshes"). Defendants David Bradley Management Co. and David Weiss (collectively "Weiss") have also moved to dismiss the complaint. The Kirshes have moved to amend their complaint. Upon the findings and conclusions set forth below and upon all the prior proceedings, the

defendants' motions for summary judgment are granted and the Kirshes' motion to amend is denied.

Parties

The Kirshes, both citizens of the State of New York, are joint owners and landlords of a multiple dwelling located at 239 Elizabeth Street, New York, New York.

Defendant City of New York is a municipal corporation and public body amenable to suit brought under 42 U.S.C. § 1983. See Monell v. New York City Dep't of Social Services, 436 U.S. 658 (1978).

Defendant Samms is employed by the Housing and Preservation Department ("HPD") and, as part of her official duties, oversees 7A administrators who are appointed by the court under Article 7A of the New York Real Property Actions and Proceedings Law.

Defendant David Weiss ("Weiss") is a principal of defendant Bradley Management and was 7A administrator of the property from August 14, 1992 until April 25, 1995.

Defendant David Bradley Management Co. ("Bradley Management") has its principal offices at 55 Sheridan Avenue, Mt. Vernon, New York. Bradley Management engages in the business of managing real estate.

Prior Proceedings

This action arose out of proceedings commenced in the Housing Part of New York Civil Court in 1987.

Under the N.Y. Real Prop. Acts. Law, Article 7A, § 769 et seq. (McKinney's 1979 & Supp.1997) (hereinafter "Article 7A"), the Commissioner HPD commenced a special proceeding in the Housing Part of the New York City Civil Court on behalf of the tenants at 239 Elizabeth Street, New York, New York, Block 508, Lot 212, a 12 unit 4 story building owned by the Kirshes (hereinafter the "Building").

On March 1, 1988, the Housing Court entered a judgment and order appointing a 7A Administrator to oversee the Building (the "Order"), pursuant to N.Y. Real Prop. Acts. Law § 778 (McKinney's 1997).

By Contempt Order of August 1988, Mara Kirsh was enjoined from entering the Building without permission or from going within one block of the Building.[1]

On November 22, 1994, the Kirshes initiated this action alleging violation of numerous constitutional provisions which occurred when the 7A Administrators rented the ground floor apartment and store front formerly inhabited by the Kirshes and removed their personal property in connection with the rental.[2]

On March 27, 1995 the City moved to dismiss the complaint as to the City defendants. By opinion of June 27, 1995 (the "June 1995 Opinion"), the claims against the City and the Commissioner of HPD were dismissed. Kirsh v. City of New York, 1995 WL 383236 (S.D.N.Y. June 27, 1995). In dismissing the claims, the Courts held that: (1) the City was not liable under Monell; (2) plaintiffs had not alleged that any HPD personnel, other than defendant Samms, took part in the rental of the apartments; (3) there was no taking of Kirshes' property; (4) the Kirshes' just compensation claim was not ripe; and (5) the Kirshes lacked standing to challenge Article 7A under the just compensation and the due process clause.

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[1] The criminal contempt order of August 1988 was upheld on appeal in Schuvler ex rel. Kirsh v. Grimaldi, 186 A.D.2d 414, 589 N.Y.S.2d (1st Dept.1992), and Kirsh v. Michetti, 787 F.Supp. 403 (S.D.N.Y.1992).

[2] The Kirshes have been incarcerated for some time on weapons possession and perjury convictions. Joseph Kirsh was indicted for weapons possession. Mara Kirsh was convicted of perjury for her testimony at Joseph's weapons possession trial. People v. Kirsh, 176 A.D.2d 652, 575 N.Y.S.2d 306 (1st Dept.1991). Both plaintiffs' convictions for conspiracy to mail threatening communications, mailing threatening communications, and possession of firearms, have been upheld by the Second Circuit in United States v. Kirsh, 1995 U.S.App. LEXIS 11778.

*2 The June 1995 Opinion left standing the first and third causes of action against Samms. These claims alleged that the rental of plaintiffs' apartment, accomplished with Samms' prior approval but without prior notice to the Kirshes, constituted a denial of the Kirshes' Fourth, Ninth and Fourteenth Amendment rights.

On September 11, 1995, Samms moved for summary judgment on these causes of action, stating that she did not give her prior approval for the rental of the units. Samms also sought summary judgment with regard to the Kirshes' challenge to the constitutionality of Article 7A on equal protection grounds. This second claim was dismissed in a separate opinion of November 14, 1995 (the "November 1995 Opinion"). Kirsh v. City of New York, 1995 WL 679242 (S.D.N.Y. Nov. 15, 1996).

Samms' motion for summary judgment regarding the Kirshes' claims of violation of constitutional rights was adjourned in order to permit the Kirshes further discovery. Discovery and motion practice related to that discovery continued through 1995 and 1996.

On April 8, 1996 Weiss moved to dismiss the complaint as to defendants David Bradley Management and David Weiss. On September 30, 1996 the Kirshes moved to amend the complaint to reinstate two previously dismissed defendants, the City and the HPD Commissioner, to add three new defendants, HPD employees Frank Vera and Fernando Buzzeo, and the current 7A Administrator Milton Manning, and to add causes of action which were previously dismissed. A briefing schedule was determined and all three motions, Samms' summary judgment motion, Weiss' motion to dismiss and the Kirshes' motion to amend, were heard on March 26, 1997.

The Facts

The facts set forth below are not at issue except as noted. There remain no material facts in dispute.

The Building

The Building is a 12 unit, 4 story building with ground floor commercial units and residential units in the other three stories. The ground floor commercial space and residential unit were the Kirshes' apartments.

The Kirshes purchased the Building in a state of disrepair and were unable to complete renovation because of disputes with the tenants, among other things. At the time of the 7A Administration proceeding, referred to above, the Kirshes had failed to make $54,000 of required emergency repairs.

The 7A Administration Order

On March 1, 1988, the Housing Court entered an order appointing a 7A Administrator to collect rents and remedy conditions at the building. The Order was issued based on the Housing Court finding that "there exists at the subject premises conditions dangerous to life, health or safety, and that there has existed a course of harassment by the landlord against the tenants." The Housing Court ordered that the property be placed under 7A administration for at least five years, but allowed the Kirshes and other interested parties the right to move for earlier termination of the administration to be granted upon a sufficient showing. The Kirshes have made several applications in the Housing Court to terminate the administration, all of which were denied.

*3 The Order allows the Kirshes to continue to occupy their apartment and the storefront on the ground floor of the Building, but directed them to remove personalty from areas of the building other than their apartment. Order, ¶ 15. The Order also permitted the Kirshes to enter only such public areas that give access to their apartment. Id. The Kirshes are not required to pay rent to the Administrator. Id. The Order does not specifically mandate that rental of the Kirshes' units require a court order.

The Role of the HPD Counselor

The HPD is responsible for ensuring that code violations are corrected, receiving the Administrator's monthly financial report, filing charges for any money borrowed on behalf of the building, and moving Housing Court for an order discharging the 7A Administrator. Id. ¶¶ 11-13.

The HPD appoints a Counselor to perform these tasks. Frank Vera was the HPD counselor of the Building from March 1989 to July 1993. Samms was appointed as the counselor of 239 Elizabeth Street in July 1993. Vera and Samms are supervised by Fernando Buzzeo, Director of the HPD Article 7A Counseling Unit.

As HPD Counselor, Samms was regularly assigned to oversee twenty to twenty-five buildings which had been appointed Article 7A Administrators, one of which was the Building. As the Counselor of a building, her duties included ensuring that the buildings assigned to her were properly maintained. Pursuant to this duty, she initially meets with the 7A Administrator to work out a plan on how the existing violations at a building will be removed. These plans are cast in the form of compliance agreements which are generally signed once a year. She also physically inspects a building every three months or so to see that needed repairs are properly made.

The Role of the 7A Administrator

The 7A Administrators are appointed by the Housing Court upon the recommendation of HPD. The 7A Administrator collects rents and, acting on behalf of the tenants, manages, repairs and maintains the building where it has been neglected by the owner. Order, ¶¶ 3, 6, 11.

The Housing Court approves repairs and expenditures by the 7A Administrator of amounts over a certain amount. The 7A Administrator is required to submit accounting reports to the HPD counselor each month and to enter a Compliance Agreement with the HPD Counselor which requires the correction of violations and other

conditions in the Building, and schedules performance review meetings with the HPD Counselor. Id. ¶ 11(c).

The 7A Administrator retains a fiduciary obligation to the building and manages the building independently, choosing tenants and contractors without HPD approval. Other than providing the monthly reports to HPD, a 7A Administrator generally does not inform the HPD counselor of his activities at a building unless it involves an expense over a specified amount. A 7A Administrator is not obligated to advise the HPD counselor in advance of any rental nor the identity of any new tenant.

*4 Defendant John Wells was the 7A Administrator from approximately March 1988 to September 1990. Defendant Debbie Leung was the 7A Administrator from October 1990 to August 1992. David Weiss was the Court appointed 7A Administrator of the Building from August 14, 1992 to April 25, 1995.

The Removal of the Kirshes' Property
and the Rental of Their Apartment

In September 1993, the Fire Department of the City of New York issued a violation order for the premises located at 239 Elizabeth Street, requiring compliance with the violation order forthwith by removing accumulations of rubbish and maintaining the premises free from such accumulations. Weiss inspected the premises himself and discovered debris, rubbish and two old motorcycles which he placed in storage. Weiss retained John McGrinder to comply with the Fire Department's violation order and to remove the rubbish, inflammable liquids, and other debris from the first floor within a week or ten days thereafter. Weiss did not request the City or the Civil Court to approve the action to comply with the violation order.

Samms first inspected the Building on October 19, 1993. During this inspection she saw a ground floor storefront commercial space that was locked up with iron bars, sealed, and without access. At that time, she was not aware that the ground floor also contained residential space.

Bradley Management, which Weiss had retained as managing agent of the Building, rented the store front in March of 1994 and the first floor apartment in April of 1994 in order to maximize rental income. Weiss did not seek Court approval or City approval before permitting Bradley Management to rent these units. The Kirshes have asserted a loss of personal property as a consequence of this action, although they have not specified what personal belongings were taken.

In April 1994, Samms made another inspection and was told by a tenant in the Building that there was a new tenant on the first floor. She did not know that the first floor residential unit existed until the tenant told her about it. The apartment was not readily visible, since its entrance was behind a stairway and sealed off with iron bars. During this inspection, Samms saw a woman living in the apartment. Samms learned that the commercial storefront had been rented out in March 1994 and that the residential back room had been rented out in April 1994. After Samms' visit, the monthly reports prepared by Weiss as 7A Administrator for the first time reported rental of the ground floor residential unit and payment of $500 a month.

After Samms inspected the Building in April 1994, she talked to Frank Vera, the prior HPD counselor, and Fernando Buzzeo, her supervisor, about the Building and was told that the space was not supposed to be rented out. In April 1994, Weiss told Samms he had permission to rent the units from the Housing Court and has testified that the only things of value in the units were motorcycles which are in storage.

*5 In October 1994, the Kirshes learned from Weiss that their apartment and storefront had been entered and then rented or leased to an unknown third party and that their personal property had been examined and removed.

Frank Vera and Mara Kirsh have stated that they told Weiss that plaintiffs' units were not to be rented out. Mara Kirsh has alleged that she and her attorney spoke to Weiss in Housing Court when he was appointed and that she told him that she and her husband would be returning to their home as soon as the court would

permit it and that she wanted new locks put on their apartments and that she did not want their units rented out. Weiss has disputed these statements.

Weiss was removed as the Article 7A Administrator for the Building on April 24, 1995 upon motion of HPD and replaced by Milton Manning.

Summary Judgment is an Appropriate Remedy

Summary judgment is appropriate where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. See Fed.R.Civ.P. 56(c). In deciding a motion for summary judgment, the court is not expected to resolve disputed issues of fact, Donahue v. Windsor Locks Board of Fire Commissioners, 834 F.2d 54, 57 (2d Cir.1987), but to determine whether there are any factual issues which require a trial. Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 585-87 (1986). The court must view the evidence in the light most favorable to the non-moving party. O'Brien v. National Gypsum Co., 944 F.2d 69, 72 (2d Cir.1991). However, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Id. at 586. This is particularly true when the issue is one on which the opponent of summary judgment would bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

Samms Did Not Violation § 1983

To state a claim under 42 U.S.C. § 1983 on the grounds that plaintiffs were deprived of their property without due process of law, the Kirshes must show, inter alia, personal involvement by a state actor. The first and third causes of action against Samms were not dismissed in the June 1995 opinion because the Kirshes had alleged that she was personally involved in the rental of their units. However, discovery has revealed that Samms was not personally involved in the rental and thus she is not liable under § 1983. The Kirshes have adduced no material fact to the contrary.

As stated in the June 95 Opinion, personal involvement is required for § 1983 liability:

> The first and third claims against the HPD Commissioner must also be dismissed because the Kirshes have failed to state any personal involvement that the Commissioner might have had in the entry, removal, and rental of their property. "[P]ersonal involvement is a prerequisite to an award of damages under § 1983." McKinnon v. Patterson, 568 F.2d 930, 934 (2d Cir. 1977), cert. denied, 434 U.S. 1087, 98 S.Ct. 1282, 55 L.Ed.2d 792 (1978).

*6 Kirsh, 1995 WL 383236 at *4. "It is well settled in this Circuit that personal involvement of defendants in alleged constitutional deprivation is a prerequisite to an award of damages under § 1983." Wright v. Smith, 21 F.3d 496, 501 (2d Cir.1994). See also Williams v. Smith, 781 F.2d 319, 323 (2d Cir.1986).

A person is personally involved in a civil rights violation if he/she directly participated in the unlawful activity, Johnson v. Glick, 481 F.2d 1028 (2d Cir.1973), or if he/she directed the particular action alleged to have caused the deprivation of a constitutional right. Duchesne v. Sugarman, 566 F.2d 817, 832 (1977). If one is outside the chain of events which cause the constitutional deprivation, one is not liable under § 1983. Stevenson v. Koskey, 877 F.2d 1435, 1439 (9th Cir.1989).

Since Samms had no personal involvement in the entry, removal and rental of the Kirshes' property, she is not liable for any violation of plaintiffs' rights and the complaint will be dismissed against her.

Weiss Did Not Act on Behalf of the State

The Kirshes have contended that Weiss was a state actor, acting in concert with Samms and on his own behalf as a court-appointed 7A Administrator. As set forth above, HPD was not involved in the alleged deprivation of property which is the subject of the complaint. What remains then is consideration of Weiss' role as a

state actor independent of any involvement of HPD in the alleged taking.

The June 1995 Opinion has already concluded that Weiss is not a state employee:

> 7A Administrators such as Weiss are not considered employees of the City or State even though they are authorized by law to manage the property and receive compensation from its revenue.
>
> The acts of 7A Administrators or the Does do not rise to the level of municipal action merely because Samms offered her approval. "[A] State's mere acquiescence in a private action [does not convert] that action into that of the State."

Kirsh, 1995 WL 383236 at *4.

Weiss, not an employee of HPD or the City, performed the acts which the Kirshes claim deprived them of their property. HPD and Weiss took no joint action in renting the units. There was no conspiracy between any employee of HPD and the 7A Administrator. The allegedly improper rental of Kirshes' apartment by Weiss was not an act performed "under color or any statute, ordinance, regulation, custom or usage of any State", 42 U.S.C. § 1983, because a private individual's allegedly tortious act does not by itself constitute a violation of the Constitution nor of § 1983. Flagg Bros. Inc. v. Brooks, 436 U.S. 149 (1978); Buck v. Bd. of Elec. of NYC, 530 F.2d 522 (2d Cir.1976); Jones v. Capital Cities, 874 F.Supp. 629 (S.D.N.Y.1995).

As found above, the 7A Administrator is appointed by the Housing Court upon the recommendations of HPD, manages the building and has a fiduciary duty to a building and its tenants. HPD monitors the 7A Administrator's action in connection with his or her efforts to cure the Housing Code violations. Article 7A does not establish any duty or obligation upon HPD vis-a-vis a building after a 7A Administrator has been appointed. Indeed, § 778(2) specifically exempts the City from liability to the owner for acts of the Administrator. HPD has no statutory or court ordered obligation to the owner of any 7A building.

*7 No authority has been cited to support the proposition that Weiss became a state actor as a result of HPD's recommendation regarding his appointment or as a result of Weiss entering a Compliance Agreement with HPD as required by the Housing Court.

Contrary to the Kirshes' contention, an administrator is not a receiver. Indeed, N.Y. Real Prop. Acts. Law § 778 even distinguishes between an administrator and a receiver. See N.Y. Real Prop. Acts. Law § 778(5). See also Gomez v. South Williamsburg Better Housing Corporation, 129 Misc.2d 542, 493 N.Y.2d 419 (N.Y. Civil Ct., 1985). The 7A Administrator acts on behalf of the tenants. Indeed, the tenants themselves can bring an action under Article 7A. Thus, the administrator is much like a fiduciary and must act in the best interests of the tenants. He must exercise independent and professional judgment to accomplish his goal of remedying conditions dangerous to the life, health and safety of the tenants. Therefore, a 7A Administrator is more like a court-appointed guardian ad litem, or a court-appointed administrator charged with the settlement of an estate. E.g., Loyd v. Loyd, 731 F.2d 393 (7th Cir.1984).

Court approval of an administrator does not create state action. For example, it is well-settled that the actions of a monitor appointed by a federal district court to oversee the implementation of a union consent decree do not constitute "state action" for constitutional purposes. See United States v. International Bhd. of Teamsters (Sansone), 981 F.2d 1362, 1371 (2d Cir.1992); United States v. International Bhd. of Teamsters (Senese and Talerico), 941 F.2d 1292, 1296 (2d Cir.1991); United States v. International Bhd. of Teamsters (Simpson), 870 F.Supp. 557, 560 (S.D.N.Y. 1994). Courts have found that state action is absent where the court-appointed union monitor is financially sponsored by the union rather than the government and where his actions are taken pursuant to a consent decree rather than pursuant to any federal or state law. See IBT 941 F.2d at 1296; IBT (Simpson), 870 F.Supp. at 560. Like a union monitor, the 7A Administrator obtains compensation from the building rather than the government. Order, ¶ 8 (authorizing Administrator to collect his fees from rent monies). The 7A Administrator acts according to the provisions of a com-

pliance agreement rather than state law. Id. ¶ 11(c). The parallels establish an absence of state action in the conduct of a 7A administrator.

For the reasons stated above, the Kirshes have failed to establish that Weiss is a state actor by virtue of his appointment as 7A Administrator.[3]

The Motion to Amend is Futile

The Kirshes seek to amend their complaint to allege that HPD and its employees are "responsible for the protection of [plaintiffs'] property" and that the City has an obligation to the court and owner to assure that the 7A judgment is properly implemented and enforced. Because of the facts found and the conclusions already stated such an amendment would be futile.

*8 In seeking to assert liability on the part of the City, the proposed amended complaint alleges that Samms and other HPD employees "should have known" about the apartments' rental or had a "callous disregard" of Weiss' alleged violation of the Kirshes' constitutional rights. The authorities are to the contrary.

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[3] Weiss has urged immunity as an additional defense, and it is well established that judges and court officials are immune from suit under § 1983 for acts performed in their official capacities. Stump v. Sparkman, 435 U.S. 349 (1978). It follows that the courts have held that a court-appointed receiver are similarly cloaked with the judge's immunity. See Bradford Audio Corp. v. Pious, 392 F.2d 67 (2d Cir.1968); Kermit Construction Corporation v. Banco Credito v. Ahorro Ponceno, 547 F.2d 1 (1st Cir. 1976). Moreover, N.Y. Real Prop. Acts. Law § 778(6) specifically states that an administrator shall be liable only in his official capacity and shall not have any liability in his personal capacity. Allowing plaintiffs to pursue a civil rights claim against the defendants might well frustrate the express language of N.Y. Real Prop. Acts. Law § 778(6) and take away the immunity the statute appears to convey to the administrator. However, having concluded that Weiss is a private actor and in the absence of a federal claim, there is no need to reach this issue.

In Bonner v. Coughlin, 545 F.2d 565 (7th Cir.1976), a guard allegedly negligently left a prisoner's cell open which resulted in the loss of his trial transcript from his cell. This was found not to be an action performed "under color of state law" within the meaning of § 1983 because the state's action ended when the guard left the cell and the loss was caused by a third-party non-governmental actor. "The taking of the transcript was neither encouraged nor condoned by state agents." Id. at 567. In Bonner, the court describes the liability standard as one requiring "facts showing intentional conduct by policy which [state agents] were legally bound to know would deprive [plaintiff] of constitutional rights." Id. at 567, (citing Monroe v. Pape, 365 U.S. 167 (1961)). In Weinrauch v. Park City, 751 F.2d 357 (10th Cir.1987), the City was held not liable for the acts of an independent contractor towing service when he acted outside the scope of his authorization and the police had not requested or authorized his assistance. Samms did not "encourage or condone" Weiss' actions within the meaning of Bonner or "request or authorize" the rental of the Kirshes' unit within the meaning of Weinrauch. There is no intentional conduct by an HPD employee which the employee knew as a matter of law would deprive the Kirshes of their constitutional rights.

Additionally, "a plaintiff may establish causation under § 1983 if he shows that the defendants participated in or were 'moving forces' behind the deprivation." Jeffries v. Harleston, 21 F.3d 1238, 1247 (2d Cir.1994). Nothing in this record supports the allegations that any HPD employees were a "moving force" behind Weiss' rental of the units in question.

It is not clear from the face of the 7A Order that the Kirshes had a right not to have their units rented to another. Whether HPD employees were aware of the original 7A Order, which, of course, they were, does not affect the ultimate legal issue that HPD has no authority to control 7A Administrators and that Weiss cleared the ground floor units and rented them without permission from anyone at HPD.

Plaintiffs' proposed amended complaint also alleges that HPD employees improperly failed to take corrective action after they

knew the units were rented. The Kirshes complain that the current 7A Administrator, Milton Manning, has taken no corrective action. The Kirshes are still in jail and there is no need for their immediate occupancy. Their goods, except for the motorcycles, appear to have been disposed of and their units have tenants with leases who are protected by the Rent Stabilization Law. When the Kirshes are released from prison and the Housing Court gives them permission to reenter the Building, they may be restored to possession of their apartments. However, HPD lacks the authority to take any such action. If the suggested corrective action is to be taken, it is the responsibility of the 7A Administrator, not HPD, to do so. Whether or not the Kirshes are free to move in state court to have the tenants' leases rescinded and to seek damages for any property improperly removed is not an issue for this Court.

*9 The Kirshes have also sought leave to amend the complaint to replead the exact same causes of action which have already been dismissed, and to have the City and the HPD commissioner renamed as defendants and add City employees, Frank Vera and Fernando Buzzeo, as well as the current 7A Administrator, Milton Manning, as defendants.

The HPD Commissioner, Vera, Buzzeo and Manning had no personal involvement in the taking of the property or the rental of the Kirshes' units, and therefore they could not be found liable under § 1983. Leave to amend should be denied where, as here, the amendment would be a futile exercise. Foman v. Davis, 371 U.S. 178 (1962), Kasten v. Modification Systems, 731 F.2d 1014, 1018 (2d Cir.1984).

The proposed amended complaint recasts the factual allegations as Monell claims but basically alleges the exact same causes of action which were previously dismissed by the court. The new facts alleged are not sufficient to keep the proposed amended complaint from being dismissed on the same grounds as those which resulted in the prior dismissals in this case.

The first and third claims in the proposed amended complaint allege § 1983 violations in the rental of the Kirshes' units by Samms and other HPD employees. As is noted above, these claims

must fail because no one at HPD authorized the rental of the Kirshes' units.

Plaintiffs' second and sixth claims in their amended complaint allege an unconstitutional taking with no just compensation under the Fifth Amendment and seek an injunction barring implementation of the 7A Order and the Order prohibiting their entry into their apartments, an accounting, and a declaration that Article 7A is unconstitutional. The June 1995 Opinion denied this relief on the grounds that the Kirshes are free to apply in Housing Court to seek compensation and that application of Article 7A to their property is not a per se taking. Kirsh, 1995 WL 383236, *7.

Plaintiffs' fourth claim in their amended complaint, that the lengthy term of the 7A appointment and the Housing Court's refusal to terminate the 7A status is an excessive fine, was dismissed in the June 1995 Opinion when it noted that the Kirshes were free to "move in Housing Court to alleviate the imposition of penalties." Id.

Plaintiffs' fifth claim in the amended complaint that Article 7A's application to downstate counties and not to upstate properties is an equal protection violation, was specifically dismissed in the November 1995 Opinion. Kirsh, 1995 WL 679242 at * 2-4. The fifth claim newly alleges that the application of the Rent Control and Rent Stabilization laws to smaller older buildings prevents their owners from raising rents and realizing a reasonable return on their property. This claim must also be dismissed because the Rent Control and Rent Stabilization laws have dispositively been found constitutional. Eisen v. Eastman, 421 F.2d 560 (2d Cir.1969), cert. denied, 400 U.S. 841 (1970); Israel v. City Rent and Rehab. Admin., 285 F.Supp. 908 (S.D.N.Y.1968); DHCR v. Berry Estates, 58 N.Y.2d 701 (1982); Matter of Freeport Randall Co. v. Hermon, 83 A.D.2d 812 (1st Dept.1981), aff'd, 56 N.Y.2d 832 (1982); Benson Realty Corp. v. Beame, 50 N.Y.2d 994 (1980); Folner v. Office of Rent Control, 27 N.Y.2d 692 (1970); Amsterdam-Manhattan, Inc. V. City Rent and Rehabilitation Administration, 43 Misc.2d 889 (1964), aff'd, 21 A.D.2d 965 (1964), aff'd, 15 N.Y.2d 1014 (1965); Ardor Management Corp. v. DHCR, 104 A.D.2d 984 (2d Dept.1984).

*10 The amended fifth claim also alleges that the combined application of the rent control laws and Article 7A results in a disproportionate number of smaller older buildings being put under Article 7A administration and being taken by the City in rem for failure to pay taxes. The Kirshes have no standing to raise this allegation since their property has not been taken for failure to pay taxes and is not currently the subject of an in rem proceeding. It would be futile to allow this claim under the facts found above.

Plaintiffs' seventh claim in their original and proposed amended complaint alleges a breach of trust and fiduciary obligation to the Building owner. The City has no fiduciary duty to the owner, as concluded above, and thus this claim has no legal merit. Plaintiffs' eighth claim of mismanagement and ninth claim for an accounting are only proper against the 7A Administrators. These three are state claims and do not supply federal jurisdiction.

In Parratt v. Taylor, 451 U.S. 527 (1979), the Supreme Court held that while there may be a deprivation of property by someone acting under color of state law, it will not necessarily state a cognizable claim under § 1983 if there had not also been a deprivation of due process. The Court determined that due process is satisfied when state law provides adequate tort remedies to claimants to compensate for negligently inflicted property loss. In other words, it is the lack of an adequate state remedy which violates due process, while the existence of an adequate state remedy provides the process that is due under the Constitution. Cf., Giglio v. Dunn, 732 F.2d 1133 (2d Cir.1984), cert. denied, 105 S.Ct. 328 (1984); Tigner v. State of New York, 559 F.Supp. 25 (W.D.N.Y.), aff'd, 742 F.2d 1432 (2d Cir.1981); see Liotta v. Rent Guidelines Bd., 547 F.Supp. 800 (S.D.N.Y.1982). The principle enunciated in Parratt is equally applicable where there has been an allegation of intentional deprivation of property without due process. Hudson v. Palmer, 104 S.Ct. 3194, 3204 (1984).

In the instant matter, the Kirshes do not state a cognizable claim under § 1983 on their seventh, eighth, and ninth amended claims because state tort remedies against the 7A Administrators remain available to them. The Kirshes may bring a state action against

Weiss for property and personal damages based on the allegedly improper rental of their property. Since these adequate state remedies are available to plaintiffs, there has been no violation of due process and the complaint will not be allowed to be amended.

In the proposed amended complaint, the Kirshes also challenge the 7A Administrators' failure to comply with applicable reporting requirements, procedures for payment of repairs, payment of property taxes, and disposition of surplus funds. These are all issues involving the administration of the Building which belong before the Housing Court, see N.Y. Real Prop. Acts. Law § 779, and are not appropriately before this Court. Since these claims were dismissed in the first complaint, the proposed amendment of the complaint to allege similar violations should not be allowed.

*11 The Kirshes, in ¶ 16 of their amended complaint, allege that the City has policies, customs and procedures which have caused constitutional violations of their rights.

To state a claim under § 1983 against the City for the actions of its employees, a plaintiff is required to plead and prove three elements: 1) an official policy or custom that 2) causes the plaintiff to be subject to 3) a denial of a constitutional right. Bastista v. Rodriguez, 702 F.2d 343, 397 (2d Cir.1983).

The proposed amended complaint does not identify any relevant statements, acts, or omissions of the City's policy-making officials which are alleged to constitute the unconstitutional policy or practice. The allegations refer only to the 7A Order and 7A Administration in this case and no facts or any other case or a policy or custom are presented.

No connection is demonstrated between any city policy and the alleged violation of their civil rights by defendant Weiss. A city is liable only when its policy or custom inflicts the injury upon the plaintiff. City of Canton v. Morris, 489 U.S. 378, 385 (1989). Moreover, a single incident of illegality or negligence is generally not sufficient to establish official policy. Turpin v. Mailet, 619 F.2d 196, 201-02 (2d Cir.), cert. denied sub nom.; Turpin v. West Haven, 449 U.S. 1016 (1980); Owen v. Haas, 601 F.2d 1242,

1246-47 (2d Cir.1979); Gomez v. City of Chicago, 506 F.Supp. 1241, 1245 (N.D.Ill.1981). See also Berry v. McLemore, 670 F.2d 30 (5th Cir.1982).

Even the allegation in the amended complaint that the City has a policy not to let plaintiffs have their property back does not create official policy. Further, there are no allegations as to the acts of 7A Administrators of any other 7A building.

The Kirshes allege that an illegal City Policy prevents the Administrator from paying them all surplus rent. The Housing Court Order specifies the priority of the 7A Administrator in distributing funds. It mandates payment in the following priority: a) first, to cure all outstanding violations, for fuel, ordinary repairs and maintenance and insurance, b) for real property taxes, c) for emergency repair expenses, and d) any surplus to the landlord after a) to c) is paid. Order, ¶ 9. These provisions are similar to N.Y.Real Prop. Acts. Law § 778(1) which lists the priority of payments. Thus, it is Article 7A itself and the applicable court order, not any policy of HPD, which determines the priority of expenditure by a 7A Administrator.

No action, policy or custom of the City caused the alleged constitutional tort of the rental of plaintiffs' apartments. Absent a showing of an affirmative link between the official policy or custom and the plaintiffs' injury, Monell prohibits a finding of liability against the City. Monell, 436 U.S. at 694 n. 58; Rizzo v. Goode, 423 U.S. 362 (1976); Singleton v. City of New York, 632 F.2d 185 (2d Cir.1980); Cowen, 601 F.2d 1242; Dominguez v. Beame, 603 F.2d 337 (2d Cir.1979).

*12 The Kirshes further allege that the City's training of 7A Administrators is improper because 7A Administrators are not given instructions on Article 7A, the rights of property owners, and the 7A Administrator's duty to pay real property taxes. Plaintiffs allege that 7A Administrators are instructed by the City that the goal of the 7A program is for the City to acquire title to 7A properties and to improperly break up invoices for repairs on 7A buildings.

Weiss' recollection of the class was that he was taught that the primary responsibility of a 7A Administrator is "to collect rents, make repairs, maintain heat and hot water, provide lease renewals and et cetera and manage the property." In response to a question asking if HPD went through the statutory scheme in the course, Weiss said, "no." He did not remember if the class covered the issue of payment of taxes or disposition of surplus funds. These are the only statements in the record about the HPD training of 7A Administrators.

These statements do not substantiate plaintiffs' allegations of improper training of 7A Administrators. There is no evidence at all that the City trained 7A Administrators to improperly break up invoices, nor of the City's alleged improper goal of acquiring the title to 7A properties. There is no evidence at all of the City's alleged lack of training on the rights of property owners.

In City of Cannon, 489 U.S. at 390, the Court ruled that in some instances a municipality's failure to adequately train its employees could provide the basis for imposing municipality liability under § 1983, if a plaintiff could show (1) deliberate indifference regarding the protection of constitutional rights on the part of the municipality in the formulation of training policies, and (2) that specific training deficiencies proximately caused the violation of plaintiff's federally protected rights. Id. at 387-92.

The Second Circuit has interpreted City of Canton to impose three requirements upon plaintiffs who allege deliberately indifferent failure to train or supervise claims under § 1983. In Walker v. City of New York, 974 F.2d 293 (2d Cir.1992), the Court held that:

> First, the plaintiff must show that a policy maker knows "to a moral certainty" that her "employees will confront a given situation . . . Thus, a policy maker does not exhibit deliberate indifference by failing to train employees for rare or unforeseen events.
>
> Second, the plaintiff must show that a situation either presents the employee with a difficult choice . . . or that there is a history of employees mishandling the situation . . .

> Finally, the plaintiff must show that the wrong choice by the city employee will frequently cause the deprivation of a citizen's constitutional rights.

Id. at 297-98.

The Kirshes have not shown "to a moral certainty" that 7A Administrators regularly deal with landlords in jail who are prohibited by court order from entering their buildings, nor that there is a history of 7A Administrators mishandling similar situations nor that such a situation regularly causes the deprivation of constitutional rights. Thus, the training claims should not be allowed.

*13 Further, a policy of inadequate training may not be inferred from a single constitutional violation by city employees, which Weiss is not. Oklahoma City v. Tuttle, 471 U.S. 808, at 824-25 (1985). "[A]dequately trained officers occasionally make mistakes. The fact that they do says little about the training program or the legal basis for holding the city liable." City of Canton, 489 U.S. at 391. It does not suffice to show that more or different training would have prevented the incident. "Such a claim could be made about most almost any encounter resulting in injury, yet not condemn the adequacy of the program to enable officers to respond properly to the usual and recurring situations with which they must deal." Id.

Where a plaintiff fails to offer any proof of his allegations of inadequate training or failure to supervise, the municipal defendants are entitled to summary judgment. See e.g. Bailed v. New York City Police Department, 910 F.Supp. 116 (E.D.N.Y.1996); Mascots v. Brown, 850 F.Supp. 1185, 1198 (S.D.N.Y.1991); Carnegie v. Miller, 811 F.Supp. 907, 912-13 (S.D.N.Y.1993); Wilson v. City of New York, 800 F.Supp. 1098, 1101 (E.D.N.Y. 1992); Judge v. City of New York, 785 F.Supp. 366, 370 (S.D.N.Y.1992); Cox v. County of Suffolk, 780 F.Supp. 103, 106-07 (E.D.N.Y.1991); Roberts by Roberts v. City of New York, 753 F.Supp. 480, 485 (S.D.N.Y.1990); Bates v. New York City Transit Authority, 721 F.Supp. 1577, 1580 (E.D.N.Y.1989).

Liability under § 1983 must be based upon the defendant's personal actions causing the constitutional infringement. Johnson v. Click, 481 F.2d 1028, 1034 (2d Cir.), cert. denied, 414 U.S. 1033 (1973); Williams v. Vincent, 508 F.2d 541, 546 (2d Cir. 1974); McKinnon, 568 F.2d 930; Duchesne, 566 F.2d at 830. Because the HPD Commissioner, Vera, and Buzzeo had no personal involvement in the circumstances which lead to the suit, there is no basis for adding them as parties.

It is well established that the liability under 42 U.S.C. § 1983 of supervisory officials cannot be based upon the doctrine of respondeat superior. Monell, 436 U.S. 658; Dominguez, 603 F.2d 337; Owen, 601 F.2d 1242. Allegations in the proposed amended complaint against Buzzeo (¶¶ 11 and 20) aver that he failed to supervise Vera and Samms regarding the alleged duty of care owed to plaintiffs. Thus the allegations against Buzzeo are based solely upon respondent superior and an amendment of the complaint to plead them would be futile since it has been concluded that no City employee has acted unconstitutionally.

The allegations in the complaint as set forth above and the proposed amended complaint against the 7A Administrators, therefore, do not state a § 1983 cause of action in the absence of state action. The proposed amended complaint should not be allowed to add Milton Manning, the current 7A Administrator.

The complaint and amended complaint against Leung, Wells and Manning involve corrective action and a refusal to provide an accounting (¶¶ 55-56) and file monthly reports in Housing Court. As the June 1995 Opinion recognized, an accounting can be sought in Housing Court and does not state a constitutional claim. Kirsh, 1995 WL 383236 at *7.

*14 The complaint against the 7A Administrators Wells and Leung will be dismissed and amending the complaint to add Manning and the seventh, eighth and ninth claims would be futile.

No Further Discovery is Warranted

The Kirshes seek further discovery since Samms initially erroneously stated the date that she was assigned to the Building as a Counselor was October 1993, not July 1993. At this juncture, there is no substantive relevance with respect to her date of appointment and there is no need to redepose her as a result of this inconsistency. The units were cleared in September and October, 1993 and rented in March and April 1994. The period of July/September 1993 is not relevant and no further discovery is warranted.

Conclusion

The defendants' motion for summary judgment dismissing the complaint against defendants Samms, Leung, Wells and Weiss is granted; the Kirshes' motions to amend their complaint and for further discovery are denied.

Enter judgment on notice.

It is so ordered.

APPENDIX E

ARTICLE 7A OF THE REAL PROPERTY ACTIONS & PROCEDURES LAW OF THE STATE OF NEW YORK

§ 769. Jurisdiction; court; venue

1. A special proceeding by tenants of a dwelling in the city of New York or the counties of Nassau, Suffolk, Rockland and Westchester for a judgment directing the deposit of rents into court and their use for the purpose of remedying conditions dangerous to life, health or safety may be maintained in the civil court of the city of New York, the district court of the counties of Suffolk and Nassau and the county courts or city courts in the counties of Rockland and Westchester.

* * * *

§ 770. Grounds for the proceeding

1. One-third or more of the tenants occupying a dwelling located in the city of New York or the commissioner of the department of the city of New York charged with enforcement of the housing maintenance code of such city, or in the counties of Nassau, Suffolk, Rockland and Westchester may maintain a special proceeding as provided in this article, upon the ground that there exists in such dwellings or in any part thereof a lack of heat or of running water or of light or of electricity or of adequate sewage disposal facilities, or any other condition dangerous to life, health or safety, which has existed for five days, or an infestation by rodents, or any combination of such conditions; or course of conduct by the owner or his agents of harassment, illegal eviction, continued deprivation of services or other acts dangerous to life, health or safety.

* * * *

§ 776. **Judgment**

The court shall render judgment either

b. Directing that (1) the rents due on the date of the entry of such judgment from the petitioning tenants and the rents due on the dates of service of the judgment on all other residential and non-residential tenants occupying such dwelling from such other tenants, shall be deposited with the administrator appointed by the court, pursuant to section seven hundred seventy-eight of this article; (2) any rents to become due in the future from all tenants occupying such dwelling shall be deposited with such administrator as they fall due; (3) such deposited rents shall be used, subject to the court's direction, to the extent necessary to remedy the condition or conditions alleged in the petition and (4) upon the completion of such work in accordance with such judgment, any remaining surplus shall be turned over to the owner, together with the complete accounting of the rents deposited and the costs incurred; and granting such other and further relief as to the court may seem just and proper. A certified copy of such judgment shall be served personally upon each non-petitioning tenant occupying such dwelling and upon the city of New York by service as provided in subdivision five of section seven hundred seventy-one of this article. If personal service on any such non-petitioning tenant cannot be made with due diligence, service on such tenant shall be made by affixing a certified copy of such judgment on the entrance door of such tenant's apartment, store or other unit and, in addition, within one day after such affixing, by sending a certified copy thereof by registered mail, return receipt requested, to such tenant. Any right of the owner of such dwelling to collect such rent moneys from any petitioning tenant of such dwelling on or after the date of entry of such judgment, and from any non-petitioning tenant of such dwelling on or after the date of entry of such judgment, and from any non-petitioning tenant of such dwelling on or after the date of service of

such judgment on such non-petitioning tenant as herein provided, shall be void and unenforceable to the extent that such petitioning or non-petitioning tenant, as the case may be, has deposited such moneys with the administrator in accordance with the terms of such judgment, regardless of whether such right of the owner arises from a lease, contract, agreement or understanding heretofore or hereafter made or entered into or arises as a matter of law from the relationship of the parties or otherwise. It shall be a valid defense in any action or proceeding against any such tenant to recover possession of real property for the non-payment of rent or for use or occupation to prove that the rent alleged to be unpaid was deposited with the administrator in accordance with the terms of a judgment entered under this section.

* * * *

§ 778. **Appointment of administrator**

1. The court is authorized and empowered, in implementation of a judgment rendered pursuant to section seven hundred seventy-six or seven hundred seventy-seven of this article, to appoint a person other than the owner, a mortgagee or lien or, to receive and administer the rent moneys or security deposited with him subject to the court's direction. The court may appoint the commissioner of the department of the city of New York charged with enforcement of the housing maintenance code of such city or his designee as such administrator, provided that he shall consent, in writing, to such appointment. Any administrator is authorized and empowered in accordance with the direction of the court, to order the necessary materials, labor and services to remove or remedy the conditions specified in the judgment, and to make disbursements in payment thereof; and to demand, collect and receive the rents from the tenants; and to institute all

necessary legal proceedings including, but not limited to, summary proceedings for the removal of any tenant or tenants; and to rent or lease for terms not exceeding three years any part of said premises, however, the court may direct the administrator to rent or lease commercial parts of said premises for terms that the court may approve. In addition, such administrator is authorized and empowered in accordance with the direction of the court to accept and repay such moneys as may be received from the department charged with enforcement of the housing maintenance code of the city of New York for the purpose of replacing or substantially rehabilitating systems or making other repairs or capital improvements authorized by the court. All moneys expended by the department pursuant to the foregoing shall constitute a debt recoverable from the owner and a lien upon the building and lot, and upon the rents and other income thereof. Such lien shall be enforced in accordance with the provisions of article eight of subchapter five of the housing maintenance code of the city of New York. Such administrator, shall, upon completion of the work prescribed in such judgment, file with the court a full accounting of all receipts and expenditure for such work. Such administrator shall dispose of the rents and other monies deposited with him according to the following order of priority:

(a) Payment in full for all of the work specified in the judgment. Until all of the work specified in the judgment has been completed and payment for such work has been made, no other disbursements shall be permitted, except for fuel bills, fire and liability insurance, and bills for ordinary repairs and maintenance.

(b) Payment of a reasonable amount for the services of such administrator.

(c) Payment of outstanding real property tax liens claimed by the city of New York.

(d) Payment of outstanding emergency repair liens filed and recorded by the city of New York and outstanding liens filed and recorded by the city pursuant to this section.

(e) Payment to the owner of any surplus remaining after payments of paragraphs (a) through (d) of this subdivision have been made.

* * * *

6. Such administrator shall be liable only in his official capacity for injury to persons and property by reason of conditions of the premises in a case where an owner would have been liable; he shall not have any liability in his personal capacity.

7. No city or county specified in section seven hundred sixty-nine of this article shall be liable to any party, including such administrator or the owner, for injury to persons or property by reason of conditions of the premises or the acts or omissions of such administrator, except that when the city of New York is appointed administrator, liability shall be determined in accordance with subdivision six of this section.

8. The commissioner of the department of the city of New York charged with the enforcement of the housing maintenance code of such city shall promulgate rules and regulations regarding criteria for the selection of administrators to be appointed pursuant to this section and shall establish and maintain a list of persons approved by such department. Unless the administrator is the city of New York, any person appointed as an administrator within such city shall be selected from among the persons approved as administrators pursuant to such list.

9. Such administrator shall, within thirty days of appointment, file with the court a plan for the provision of essential services and for the correction of such other hazardous conditions as may exist at the premises, specifying

dates by which such services shall be provided and such conditions corrected. If such administrator cannot provide such services and correct such conditions by the dates specified in the plan, he shall be required to file with the court an amendment to the plan setting forth the reasons why such services and such corrections could not be provided by such date and specifying new dates for such services and corrections. Such plan and any amendments to such plan shall be provided to the tenants by mail or by posting in a common area of the building and to the owner of record by mail.

§ 779. **Presentation or settlement of accounts**

The court shall require the keeping of written accounts itemizing the receipts and expenditures under an order issued pursuant to section seven hundred seventy-six or seven hundred seventy-seven of this article, which shall be open to inspection by the owner, any mortgagee or lienor or any other person having an interest in such receipts or expenditures provided, however, notwithstanding any other provision of law to the contrary, such information as may be in the possession of the city of New York with the department charged with the enforcement of the housing maintenance code of such city shall be available from such department for inspection only by the owner, tenant of such property, or person having a recorded interest in the property. Upon motion of the court or the administrator or of the owner, any mortgagee or lienor of record or any person having an interest, the court may require a presentation or settlement of the accounts with respect thereto. Notice of a motion for presentation or settlement of such accounts shall be served on the owner, any mortgagee or other lienor of record who appeared in the proceeding and any person having an interest in such receipts or expenditures.

* * * *

APPENDIX F

[Dated November 22, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MARA KIRSH and JOSEPH KIRSH, Plaintiffs, vs. CITY OF NEW YORK, THE COMMISSIONER OF THE DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK, DAVID BRADLEY MANAGEMENT CO., DAVID WEISS, DEBBIE LEUNG, JOHN WELLS, SHEILA SAMMS, JANE and JOHN DOE, Defendants.	)	CIVIL ACTION NO. COMPLAINT (Jury Trial Demanded)

I

GENERAL ALLEGATIONS

MARA and JOSEPH KIRSH, by Rose Schuyler their attorney-in-fact, for their complaint against the above named Defendants, allege:

1. Plaintiffs bring this action to seek legal and equitable relief for violations of their civil and constitutional rights and their rights under the laws of the United States and the State of New York.

2. This Court has subject matter jurisdiction under 28 U.S.C. Sections 1331 and 1343, and pursuant to its pendant and ancillary jurisdictional powers.

3. Mara and Joseph Kirsh are citizens of the United States and of the State of New York, and, as wife and husband, joint owners

of the property located at and commonly known as 239 Elizabeth Street, Manhattan, New York (Block 508, Lot 42) (hereinafter referred to as "the Property."). Rose Schuyler is Mara Kirsh's mother and was granted powers of attorney by both Mara and Joseph Kirsh, which powers have not been revoked and are currently in effect.

4. Defendant City of New York is a municipal corporation duly organized and established under the laws of the State of New York, a public body amendable to suing and being sued in its own name, and is responsible for the acts of its agencies and officers, including the Department of Housing Preservation and Development of the City of New York ("HPD"), its Commissioner, and those persons and entities who have acted as its agents, committed under color of law and in the course of their official duties, including those who from time to time have been appointed under Article 7A of the RPAPL of the State of New York ("Art. 7A") Administrators of the Property.

5. Defendant HPD Commissioner is an agent and officer of the City of New York and the chief executive officer of HPD, who has initiated actions and proceedings to have Administrators appointed under Art. 7A, taken other adverse actions against the Plaintiffs, and is responsible for overseeing the actions of the 7A Administrators and assuring that the Administrators fulfill their responsibilities and manage the Property properly and in accordance with the law.

6. Defendant David Bradley Management ("DBM") is an entity that engages in the business of managing real estate, has its principal offices at 55 Sheridan Avenue, Mt. Vernon, NY and Defendant David Weiss is a principal of David Bradley Management and is the current 7A Administrator of the Property and since his appointment in or about July 1992, in such capacity with respect to the matters complained of below, acted at all times under color of law as a agent of the City of New York and under the supervision of the Commissioner.

7. Defendants Debbie Leung and John Wells preceded Defendant Weiss as 7A Administrators of the Property, Ms. Leung from approximately October 1990 to Defendant Weiss's appointment in or

about July 1992, and Mr. Wells from approximately March 1988 until Ms. Leung's appointment in or about October 1990 and in such capacity at all times relevant herein with respect to the acts complained of below acted at all times under color of law as a agent of the City of New York and under the supervision of the Commissioner.

8. Defendant Sheila Samms is employed by HPD and as part of her official duties oversees the 7A Administrator's management of the Property in accordance with the requirements of law and all applicable court orders and in such official capacity at all times relevant herein with respect to the acts complained of below acted at all times under color of law as a agent of the City of New York and under the supervision of the Commissioner.

9. Defendants John and Jane Doe are those other officers, agents and representatives of the City of New York and HPD who are responsible for and oversee the management of properties under Art. 7A, including the Property which is the subject matter of this action, in accordance with the requirements of law and all applicable court orders and in such capacity at all times relevant herein with respect to the acts complained of below acted at all times under color of law as a agent of the City of New York and under the supervision of the Commissioner.

10. In and during 1987 the HPD Commissioner instituted an *in rem* action in the Civil Court of the City of New York, County of New York, Housing Division to place the Property under Art. 7A Administration to do certain repairs estimated to cost approximately $54,000.00 and to have one of Plaintiff's tenants, John Wells, appointed Administrator to collect the rents, have the required repairs and manage the Property until the specified repairs were completed at which time the Property was required to be returned to Plaintiffs and together with all surplus funds; and a Judgment and Order placing the Property in 7A Administration and appointing Defendant Wells Administrator was entered on or about March 1, 1988, a true and correct copy of which is appended hereto as Exhibit A.

11. Under the March 1, 1988 Judgment and Order, the Plaintiffs, who resided at the Property, occupying exclusively the first floor apartment and a room that had been previously used as a store front as their home, were allowed to continue to live and have exclusive use of their home without the need to pay rent. The rents from the building, approximately $5,000.00, per month, had been the Plaintiffs' principal source of income and since the Property was first acquired on December 26, 1979, Plaintiffs had made substantial improvements to the Property. Since the Property was placed in Administration, Plaintiffs have been deprived of any and all income from their Property, have not been provided regular and adequate accountings of moneys collected and spent, nor any reason for Defendants' failure to return the Property to them after completion of the approximately $54,000.00 in repairs the Commissioner sought in the Petition and for which the court granted the March 1, 1988 Judgment and Order.

12. Since sometime in 1988 Plaintiffs have been enjoined and otherwise prohibited by the Defendants from entering the building, and, as a result from removing their personal property from their home or from the Property except with prior permission. The aforesaid restrictions were imposed on Mara Kirsh as a condition to her probation and as part of her contempt punishment for alleged acts of interference with the Administrator. Plaintiffs' former counsel, Robert Cammer, advised them that HPD informed him that the same restrictions applied to Joseph Kirsh. Plaintiffs' being barred from their home and possessions, denied any income from their property, and Defendants' failure to return management of the property back to Plaintiffs after the repairs were completed have caused Plaintiffs to endure and suffer great mental, emotional and psychological pain and suffering, substantial economic and financial hardship, deprivation, and losses, and serious and permanent injuries to their health.

13. In or about September 1994, Plaintiffs were informed that a representative of HPD stated that HPD did not intend to ever return the Property to Plaintiffs. The aforesaid statement and the fact that the Property has not been returned to Plaintiffs is the result of and an instance of a policy, custom and practice of the

City of New York, the Commissioner and HPD, together with its agents, officers, employees and Administrators whereby Article 7A is used to take property from the rightful owner without just compensation, without notice and disclosure of the true intent of the proceeding, and in violation of the owner's constitutional rights.

14. On or about October 7, 1994, Plaintiffs learned for the first time from Mr. Weiss that with the prior approval of Ms. Samms sometime during 1994, without prior notice to Plaintiffs and without prior court authorization, Plaintiffs' home was entered, their possessions, including papers and effects examined and removed from their home, the apartment and the store front, and from other parts of the building, and the apartment and store front were rented or leased to other persons or entities, without Plaintiffs' prior knowledge or consent. These actions were taken without the prior institution of any court proceeding to obtain a judgment and order authorizing such actions, constituted an invasion of their privacy and the sanctity of their home, and Plaintiffs were not justly compensated for the loss of their home or the disposition of their property.

15. Plaintiffs, through their attorney, immediately demanded, *inter alia*, return of their home, return of all their personal property, an accounting of all their personal property that was removed from their home and not returned, copies of all financial reports filed by the Administrators, and termination of the 7A Administration of the Property. Plaintiffs' attorneys calls to the Mayor's Office, to Corporation Counsel's Office, to the General Counsel's Office of HPD, and to various departments of HPD, including Ms. Samms, were to no avail or were not responded to.

II

FIRST CLAIM FOR RELIEF AGAINST THE DEFENDANTS FOR VIOLATIONS OF 42 U.S.C. SECTION 1983, 5th AND 14th AMENDMENTS, AND ARTICLE I § 6 NYS CONSTITUTION

16. Repeat and reallege the allegations in Paragraphs 1 - 15 of this Complaint.

17. Under the Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution, and Article I Section 6 of the Bill of Rights of the Constitution of the State of New York, Plaintiffs as citizens of the United States and the State of New York and persons within and subject to the jurisdictions thereof may not be deprived of their property without Due Process of Law.

18. The Defendants City of New York, the HPD Commissioner, HPD Samms, the Does, DBM and Weiss, acting under color of law, by their aforesaid actions, intentionally or with reckless and callous disregard of Plaintiff's rights, entered, or caused, or authorized others to enter, remove and dispose of Plaintiff's personal property and lease or rent Plaintiffs', both the apartment and store front, to other persons or entities, without prior notice to Plaintiffs and hearing before a court with jurisdiction, or acceded to or acquiesced in these aforesaid unlawful and unconstitutional acts. Defendants have thereby taken, removed, destroyed, disposed of and otherwise deprived Plaintiffs of their home and property and violated their constitutionally protected liberty and privacy rights and interests without Due Process of Law, procedurally and substantively, and have thereby in contravention of 42 U.S.C. § 1983 wrongfully denied them and violated the rights, privileges and immunities secured to them under the aforesaid Amendments of the Constitution of the United States of America. Defendants knew or should have known that their aforesaid wrongful acts were in violation of Plaintiff's fundamental constitutional and common law rights.

19. As a direct and proximate result of the Defendants' aforesaid unlawful and unconstitutional actions, Plaintiffs have had their most basic and sacred constitutional rights and protected interests violated, have been deprived of their home and personal property without Due Process of Law, and without justification or good cause therefor, have suffered great mental, emotional, mental, psychological and physical pain and suffering and injuries to their health, substantial economic and financial hardship, deprivation and losses, have and are incurring expenses, including attorney fees, which they would not have otherwise incurred, for which Plaintiffs

seek declaratory, mandatory and injunctive relief enjoining further implementation of the Article 7A Judgment and Order and all related orders and injunctions, including any judicial or administrative prohibition barring either or both Plaintiffs from entering upon the Property, termination of the 7A Administration of their property, restoration of their home, an accounting of all their personal property removed from their home and return of their personal property that has not been sold or otherwise disposed of, an accounting of all monies obtained from rents and from the disposition of any of their property, and $10 million in compensatory and consequential damages, and punitive or exemplary damages.

III

SECOND CLAIM FOR RELIEF AGAINST THE DEFENDANTS FOR VIOLATIONS OF 42 U.S.C. SECTION 1983, 5th AND 14th AMENDMENTS, AND ARTICLE I § 7 NYS CONSTITUTION

20. Repeat and reallege the allegations in Paragraphs 1 - 19 of this Complaint.

21. Under the Just Compensation Clause of Fifth Amendment and as incorporated and applied to Defendants through the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution, and under Just Compensation Clause of Article I Section 7 of the Bill of Rights of the Constitution of the State of New York, Plaintiffs as citizens of the United States and the State of New York and persons within and subject to the jurisdictions thereof may not be deprived of their property without Just Compensation.

22. The Defendants City of New York, the HPD Commissioner, HPD Samms, the Does, DBM and Weiss, acting under color of law, by their aforesaid actions, intentionally or with reckless and callous disregard of Plaintiff's aforesaid constitutional rights have taken and otherwise deprived Plaintiffs of their home and property without Just Compensation in violation of Plaintiffs' aforesaid federal and state Constitutional rights, and thereby have in con-

travention of 42 U.S.C. § 1983 denied Plaintiffs and violated the aforesaid rights, privileges and immunities secured to them under the aforesaid Amendments to the Constitution of the United States of America, thereby causing them to suffer the injuries, losses and damages heretofore alleged. Defendants knew or should have known that their aforesaid wrongful acts were in violation of Plaintiffs' most fundamental constitutional and common law rights.

IV

THIRD CLAIM FOR RELIEF AGAINST THE DEFENDANTS FOR VIOLATIONS OF 42 U.S.C. SECTION 1983, 4th, 9th AND 14th AMENDMENTS, AND ARTICLE I § 12 NYS CONSTITUTION

23. Repeat and reallege the allegations in Paragraphs 1 - 22 of this Complaint.

24. Under the Secure In The Home Clause and the Search and Seizure Provisions of the Fourth Amendment, as incorporated and applied to Defendants by the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and under the additional Privacy Rights protected by the Ninth Amendment of the United States Constitution, and under Article I Section 12 of the Bill of Rights of the Constitution of the State of New York, Plaintiffs as citizens of the United States and the State of New York and persons within and subject to the jurisdictions thereof have the constitutional rights to be secure in their persons, houses, papers and effects against unreasonable seizures, not to have their property seized except upon issuance of a warrant by a neutral magistrate upon a showing of probable cause, and not to have the sanctity of their home and their fundamental privacy interests violated by unwarranted governmental intrusions.

25. The Defendants City of New York, the HPD Commissioner, HPD Samms, the Does, DBM and Weiss, acting under color of law, by their aforesaid actions, intentionally or with reckless disregard of Plaintiffs' aforesaid constitutional rights by their aforesaid actions have violated Plaintiffs' aforesaid federal and state

constitutional rights and thereby have in contravention of 42 U.S.C. § 1983 wrongfully denied Plaintiffs and violated the rights, privileges and immunities secured to Plaintiffs under the aforesaid Amendments to the Constitution of the United States of America, thereby causing them to suffer the injuries, losses and damages heretofore alleged. Defendants knew or should have known that their aforesaid wrongful acts were in violation of Plaintiff's most fundamental constitutional and common law rights.

V

FOURTH CLAIM FOR RELIEF AGAINST THE DEFENDANTS FOR VIOLATIONS OF 42 U.S.C. SECTION 1983, 5th, 8th & 14th AMENDMENTS, & ARTICLE I §§ 5 & 6 NYS CONSTITUTION

26. Repeat and reallege the allegations in Paragraphs 1 - 25 of this Complaint.

27. Under the Eighth Amendment's Prohibitions against Excessive Fine and Cruel and Unusual Punishment, as incorporated and applied to Defendants under the Due Process and Equal Protection Clauses of the Fourteenth Amendments of the United States Constitution, and under Article I Section 5 of the Bill of Rights of the Constitution of the State of New York, Plaintiffs as citizens of the United States and the State of New York and persons within and subject to the jurisdictions thereof have the constitutional rights not to be made subject of excessive fines or cruel and unusual punishment and under the Due Process Clause of the Fifth and the Due Process and Equal Protection Clauses of the Fourteenth Amendments of the United States Constitution and Article I, Section 6 of the Bill of Rights of the Constitution of the State of New York, Plaintiffs also have a right not to be subjected to a fundamentally unjust punishment.

28. Enjoining and denying Plaintiffs the right to live in their home these last seven years, taking their home away from them and allowing strangers to live and occupy their home without Plaintiff's prior consent, removing, disposing of Plaintiffs' personal

property, including papers and effects, and not promptly returning management of the property to them immediately upon correction of the emergency situation for which the property was placed into 7A Administration, and not paying over to Plaintiffs the surplus funds collected, which should have exceeded $300,000.00, constitutes the imposition of excessive fines and cruel and unusual punishment in violation of the Plaintiffs' aforesaid Eighth and Fourteenth Amendments and Article I Section 5 of the Bill of Rights of New York's Constitution, and also is fundamentally unjust punishment in violation of Plaintiffs' aforesaid Fifth and Fourteenth Amendments and Article I, Section 6 of the Bill of Rights of New York's Constitution, and the Defendants intentionally or with reckless disregard of Plaintiffs' aforesaid constitutional rights thereby have wrongfully in contravention of 42 U.S.C. § 1983 denied Plaintiffs and violated the rights, privileges and immunities secured to Plaintiffs under the aforesaid Amendments of the Constitution of the United States of America, thereby causing them to suffer the injuries, losses and damages heretofore alleged. Defendants knew or should have known that their aforesaid wrongful acts were in violation of Plaintiff's most fundamental constitutional and common law rights.

VI

FIFTH CLAIM FOR RELIEF AGAINST THE DEFENDANTS 5th AND 14th AMENDMENTS, AND ARTICLE I § 1 NYS CONSTITUTION

29. Repeat and reallege the allegations in Paragraphs 1 - 28 of this Complaint.

30. Under the Due Process and Just Compensation Clauses of the Fifth, as incorporated and applied to Defendants under the Fourteenth Amendment and under the Due Process, Equal Protection, and Privileges and Immunities Clauses of the Fourteenth Amendment of the United States Constitution, and under Article I Section 1 of the Bill of Rights of the Constitution of the State of New York, Plaintiffs as citizens of the United States and the State of

New York and persons within and subject to the jurisdictions thereof have the constitutional rights to Equal Protection of the Law and not to be deprived of their fundamental right to own property and pursue a lawful livelihood except by law of the land, applicable equally, rationally and fairly to all such citizens, or by judgment of their peers.

31. Plaintiffs' aforesaid fundamental property and livelihood rights have been and are subject to greater restriction, limitation, deprivation and loss without just cause or a rational basis under Art. 7A merely because the Property is located in one of the five counties to which Article 7A applies, whereas persons in similar circumstances in another part of the State to which Art. 7a does not apply and therefore would not have their fundamental property and livelihood rights equally subject to the same restrictions, limitations, deprivation and loss under Art. 7A, as a result, Plaintiffs aforesaid federal and state constitutional rights have been and are being thereby violated by the Defendants, wherefore Article 7A should be declared unconstitutional and its further application permanently enjoined.

VII

SIXTH CLAIM FOR RELIEF AGAINST THE DEFENDANTS 5th AND 14th AMENDMENTS, & ARTICLE I §§ 1, 5-6 NYS CONSTITUTION

32. Repeat and reallege the allegations in Paragraphs 1 - 31 of this Complaint.

33. Article 7A on its face, and/or as applied in New York County, is unconstitutional because the law constitutes and operates as a taking of property without just compensation and without trial by jury and it has operated and been applied in New York County as a means of taking property from the owner, not returning the property to the owner, nor paying the owner just compensation and accordingly Article 7A and/or its implementation by Defendants should be declared and permanently enjoined as unconstitutional.

VIII

SEVENTH CLAIM FOR RELIEF AGAINST THE DEFENDANTS FOR BREACH OF TRUST AND FIDUCIARY OBLIGATIONS, VIOLATIONS OF 42 U.S.C. SECTION 1983, 4th, 5th, 9th AND 14th AMENDMENTS, AND ARTICLE I §§ 1, 2, 5,6, 7 & 12 NYS CONSTITUTION

34. Repeat and reallege the allegations in Paragraphs 1 - 33 of this Complaint.

35. When Plaintiffs' Property was placed in Art. 7A Administration. since neither the Property not its income thereby became the property of any of the Defendants but remained the Plaintiffs' property, a trust or constructive trust was thereby established or created for the Property and all rental income received, and the Defendants had a fiduciary, statutory, and constitutional obligation to manage the Property and oversee the management of the Property to make the repairs required by the March 1, 1988 Judgment and Order, and to then return the Property and all surplus income to Plaintiffs as the rightful and lawful owners of the Property and not deny them the Property, its income or any of their lawful rights as owners of the Property in violation of any of their federal and state constitutional rights. Defendants were obligated to do so as a matter of and under the Provisions and Clauses of the Fourth, Fifth, Ninth and Fourteenth Amendments of the United States Constitution and of Article I, Sections 1, 2, 5, 6, 7 and 12 of the Bill of Rights of the Constitution of the United States as heretofore set forth in the preceding Claims for Relief.

36. Defendants intentionally, or with reckless or negligent disregard of their fiduciary obligations to Plaintiffs and of Plaintiffs' constitutional and common law rights, breached and failed to comply with these aforesaid fiduciary, statutory and constitutional obligations by, *inter alia*, failing to return the Property to Plaintiffs after the $54,000.00 in repairs were completed, failing to pay over to Plaintiffs all rents collected after such repairs were completed, by continuing to manage the Property, collect and expend funds without due justification, and by failing to account and turn over

to Plaintiffs all surplus funds, disposing of Plaintiffs' property, entering and taking away Plaintiffs' home, and otherwise acting in derogation and disregard of Plaintiffs' common law, statutory and constitutional rights, and the Defendants by their aforesaid wrongful actions have thereby intentionally, or with reckless disregard of Plaintiffs' federal and state constitutional, statutory and common law rights have violated Plaintiffs' aforesaid rights and thereby in contravention of 42 U.S.C. § 1983 wrongfully denied Plaintiffs and violated the rights, privileges and immunities secured to them under the aforesaid Amendments to the Constitution of the United States of America, thereby causing them to suffer the injuries, losses and damages heretofore alleged and wherefore they are also liable to account for all moneys collected and expended, and for punitive and exemplary damages for the expenditure of all moneys that should have been paid over to Plaintiffs. Defendants knew or should have known that their aforesaid wrongful acts were in violation of Plaintiff's most fundamental constitutional and common law rights.

IX

EIGHTH CLAIM FOR RELIEF AGAINST THE DEFENDANTS FOR MISMANAGEMENT, BREACH OF FIDUCIARY OBLIGATIONS, VIOLATIONS OF 42 U.S.C. SECTION 1983, 4th, 5th, 9th AND 14th AMENDMENTS, AND ARTICLE I §§ 1, 2, 5,6, 7 & 12 NYS CONSTITUTION

37. Repeat and reallege the allegations in Paragraphs 1 - 36 of this Complaint.

38. Defendants were obligated to manage the Property properly in accordance with the standards applied by professional property managers and with the objective of completing the required repairs reasonably promptly at the estimated or reasonable cost, returning the Property to Plaintiffs, with all surplus funds, as soon as reasonably possible, fulfilling the obligations imposed on them by the March 1, 1988 Judgment and Order and the statute, with due regard for the fiduciary obligations owed to Plaintiffs and for Plain-

tiffs' aforesaid federal and state constitutional and common law rights.

39. Defendants intentionally or with reckless disregard of Plaintiffs' rights breached their aforesaid duty of care, fiduciary, statutory and constitutional and common law obligations owed Plaintiffs by intentionally, or as the result of reckless indifference, gross negligence, or in violation of the standard of care imposed upon property managers, failing to timely file reports with the court as required, by expending monies not necessary for completion of the required repairs, by failing to make repairs necessary to maintain the good condition of the building, by expending surplus monies, by not timely paying real estate taxes, by not applying for reductions in real estate taxes, by not collecting rent arearages or evicting non-paying tenants, by not seeking appropriate rent increases, and by other acts and omissions which have resulted in a substantial deterioration of Property's condition and value. By Defendants' aforesaid breaches and mismanagement, Defendants have violated the duties of care and fiduciary obligations owed Plaintiffs and Plaintiffs' aforesaid federal and state constitutional rights, and the Defendants thereby have in contravention of 42 U.S.C. § 1893 also wrongfully denied Plaintiffs and violated the rights, privileges and immunities secured to them under aforesaid Amendments to the Constitution of the United States of America, thereby causing them to suffer the injuries, losses and damages heretofore alleged and wherefore they are also liable to account for all moneys collected and expended, and for punitive and exemplary damages for the expenditure of all moneys that should have been paid over to Plaintiffs. Defendants knew or should have known that their aforesaid wrongful acts were in violation of Plaintiff's fundamental constitutional and common law rights, and the duties of care and fiduciary obligations they owed Plaintiffs.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for entry of Judgment in their favor and against the Defendants personally and in their official capacities, jointly and severally:

A. On Plaintiffs' Fifth and Sixth Claims for Relief, Declaring Article 7A unconstitutional on its face or as implemented by Defendants and permanently enjoining its application and enforcement;

B. On Plaintiffs' First, Second, Third, Fourth, Seventh and Eighth Claims for Relief

(i) setting aside, voiding, terminating, or enjoining the enforcement of the March 1, 1988 Judgment and Order, and all other Judgments and Orders of courts or administrative agencies which have enjoined either or both Plaintiffs from going near or returning to their Property,

(ii) ordering and directing Defendants to take all measures necessary to fully restore to Plaintiffs all property rights Plaintiffs had prior to entry of the March 1, 1988 Judgment and Order as the true and lawful owners of the Property, including full and all management rights,

(iii) ordering and directing Defendants to take all measures necessary to return to Plaintiffs for their exclusive use and enjoyment their apartment, the store front, and all personal property that has been removed and not otherwise disposed of and until such time as Plaintiffs home is restored to them for their exclusive use and enjoyment, providing Plaintiffs at no cost to Plaintiffs a comparable home in the same neighborhood,

(iv) requiring Defendants to account for all rents and any other monies received from the Property, including any interest paid, and all the personal property, papers and effects of Plaintiffs that were at any time removed from the Property, and

(v) and awarding Plaintiffs $10 million in compensatory and consequential damages, and for punitive or exemplary damages, as may be determined by the trier of fact to be appropriate, for all monies expended which should have been turned over to Plaintiffs, and for all monies lost as a result of mismanagement and the Administrators' failure to collect rents and to seek appropriate increases in rent;

C. For the costs of this action, including reasonable attorneys fees; and

D. For such further and different relief as may be necessary, just and proper.

Dated: November 22, 1994

Rose Schuyler As Attorney-In-Fact For
Mara and Joseph Kirsh, Plaintiffs

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APPENDIX G

[Dated July 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MARA KIRSH and JOSEPH KIRSH, Plaintiffs, vs. CITY OF NEW YORK, THE COMMISSIONER OF THE DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK, DAVID BRADLEY MANAGEMENT CO., DAVID WEISS, DEBBIE LEUNG, JOHN WELLS, SHEILA SAMMS, FRANK VERA, FRANK BUZZEO, and MILTON MANNING, Defendants.	CIVIL ACTION NO. 94 Civ. 8489 (Hon. Robert W. Sweet, U.S.D.J.) AMENDED COMPLAINT (Jury Trial Demanded)

I

GENERAL ALLEGATIONS

MARA and JOSEPH KIRSH, for their Amended Complaint against the above named Defendants, allege:

JURISDICTION

1. Plaintiffs bring this action to seek legal and equitable relief for violations of their civil and constitutional rights and their rights under the laws of the United States and the State of New York.

2. This Court has subject matter jurisdiction under 28 U.S.C. Sections 1331, 1343, and 2254 and pursuant to its pendant and ancillary jurisdictional powers.

PLAINTIFFS

3. Mara and Joseph Kirsh are citizens of the United States and of the State of New York, and, as wife and husband, joint owners of the property located at and commonly known as 239 Elizabeth Street, Manhattan, New York (Block 508, Lot 42) (hereinafter referred to as "the Property."). Rose Schuyler is Mara Kirsh's mother and was granted powers of attorney by both Mara and Joseph Kirsh, which powers have not been revoked and are currently in effect.

DEFENDANTS

4. Defendant City of New York is a municipal corporation duly organized and established under the laws of the State of New York, a public body amendable to suing and being sued in its own name, and is responsible for the acts of its agencies and officers, including the Department of Housing Preservation and Development of the City of New York ("HPD"), its Commissioner, and those persons and entities who have acted as its agents, committed under color of law and in the course of their official duties, including those who from time to time have been appointed under Article 7A of the RPAPL of the State of New York ("Art. 7A") Administrators of the Property.

5. Defendant HPD Commissioner is an agent and officer of the City of New York and the chief executive officer of HPD who has initiated actions and proceedings to have Administrators appointed under Art. 7A, taken other adverse actions against the Plaintiffs, and is responsible for overseeing the actions of the 7A Administrators and assuring that the Administrators fulfill their responsibilities and manage the Property properly and in accordance with the law and the judgments and orders of the Court. The Commissioner is sued in her/his official capacity only.

6. The defendant 7A Administrators were appointed by the Civil Court of the City of New York (the Housing or Landlord Tenant Part) under Article 7A and at all times relevant herein in connection with the acts and omissions being complained about

were acting pursuant to the Judgment and Orders of that Court and under color of state law, subject to the supervision of the Court and by the City Defendants.

7. Defendant Milton Manning, d.b.a., Sugar Hill Services & Community Footprints, with an office at 880 St. Nicholas Avenue, Apt. 21, New York, N.Y. 10032, in or about June 1995 was appointed and is the current 7A Administrator of the Property and since his appointment, in such capacity with respect to the matters complained of below, acted at all times under color of law as a state official pursuant to the order of the Civil Court of the City of New York, and as an agent of the City of New York and under the supervision of the Commissioner.

8. Defendant David Bradley Management ("DBM") is an entity that engages in the business of managing real estate, has its principal offices at 55 Sheridan Avenue, Mt. Vernon, NY and Defendant David Weiss is a principal of David Bradley Management and was the 7A Administrator of the Property from in or about July 1992 to in or about June 1995, and in such capacity with respect to the matters complained of below, acted at all times under color of law as a state official and as an agent of the City of New York and under the supervision of the Commissioner.

9. Defendants Debbie Leung and John Wells preceded Defendant Weiss as 7A Administrators of the Property, Ms. Leung from approximately October 1990 to Defendant Weiss's appointment in or about July 1992, and Mr. Wells from approximately March 1988 until Ms. Leung's appointment in or about October 1990 and in such capacity at all times relevant herein with respect to the acts complained of below acted at all times under color of law as state officials and as agents of the City of New York and under the supervision of the Commissioner.

10. Defendants Sheila Samms and Frank Vera are employed by HPD as 7A property managers and as part of their official duties oversee, or have overseen, the 7A Administrator's management of the Property in accordance with the requirements of law and all applicable Court orders and were, at all relevant times, otherwise responsible for protection of the Property, and in such official

capacity at all times relevant herein with respect to the acts complained of below acted at all times under color of law as a agent of the City of New York and under the supervision of the Commissioner. Mr. Vera was the HPD 7A Manager for the property from March 1988 until either July or October 1993, when he was succeeded by Ms. Samms. Both Mr. Vera and Ms. Samms were directly supervised by Frank Buzzeo.

11. Defendant Frank Buzzeo is employed by HPD as a 7A Property Supervisor, and as part of his official duties was, at all relevant times, responsible for overseeing the actions of Defendants Samms and Vera to assure that the management of properties under Art. 7A, including the Property which is the subject matter of this action, was in accordance with the requirements of law and all applicable Court orders and that Defendants Vera and Samms were fully informed of the rights and interests of the Plaintiffs with respect to the Property, including receipt and disposition of its rental income, Plaintiffs home and all personal property in their home and in other parts of the Property, and such capacity at all times relevant herein with respect to the acts complained of below acted at all times under color of law as a agent of the City of New York and under the supervision of the Commissioner.

THE FACTS COMMON TO THE CLAIMS

The 7A Judgment & Order

12. In and during 1987 the HPD Commissioner instituted an *in rem* action in the Civil Court of the City of New York, County of New York, Housing Division

– to place the Property under Art. 7A Administration to do certain repairs estimated to cost approximately $54,000.00,

– to punish Plaintiffs for allegedly harassing tenants, and

– to have one of Plaintiff's tenants, John Wells, appointed the 7A Administrator to collect the rents, have the required repairs and manage the Property and disperse surplus income to Plaintiffs until the Property was returned to Plaintiffs' management and

control; and a Judgment and Order placing the Property in 7A Administration and appointing Defendant Wells Administrator was entered on or about March 1, 1988, a true and correct copy of which is appended to the original Complaint as Exhibit A.

13. Under the March 1, 1988 Judgment and Order,

(a) ¶ 15 the Plaintiffs, who resided at the Property, occupying exclusively the first front and rear rooms as their home, were allowed to continue to live and have exclusive use of these quarters without the need to pay rent;

(b) ¶ 9 the rents collected by the Administrator could only be dispersed in the order of priorities listed therein: *first* for the emergency repairs listed in the Petition and until completion of those repairs, routine supplies, services, maintenance and repairs; *second* payment of property taxes; *third* payment of outstanding repair expenses and liens and *finally*, payment of surplus moneys to the owners;

(c) ¶ 10 Court authorization on notice to all parties had to be obtained to do additional work, including new emergency repairs; and

(d) ¶ 7 the 7A Administrator had to obtain prior Court approval before entering into any contract for repairs or services for more than $3500, including for the emergency repairs cited in the Petition. This restriction was made expressly applicable to the powers of the 7A Administrator as set forth in ¶s 4,5, and 6 of the 7A Judgment and Order.

14. The 7A Judgment and Order further provided, *inter alia*,

(a) in ¶ 11g that the Administrator would appear before the Court at intervals no less than 60 days to report to and review the Administrator's management and operation of the premises and the monthly financial statements;

(b) in ¶ 11h to file with the Court and HPD every month a financial statement of all receipts and expenditures in the formats prescribed by the Court or HPD; and

(c) in ¶ 11j to advise the Court of any vacancies.

15. The aforesaid provisions of the 7A Judgment and Order are in accordance with the comparable provisions of the 7A Statute and these provisions are intended to assure not only the proper temporary administration of the property but also that the property owners' rights and interests are protected during the period of 7A Administration.

The City's Policies, Customs & Practices

16. In violation of the 7A Statute and the 7A Judgment and Order in this case, and those entered in other cases, the City has adopted policies, customs and practices whereby these provisions are disregarded, the rights of the property owners are disregarded and violated knowingly and intentionally, with reckless disregard or deliberate indifference to the rights and interests of Plaintiffs and others similarly situated, and the City fails to act where it is required to do so by virtue of its obligations to the Court and owners that arise out of its participation in initiating the 7A proceedings, undertaking to supervise and oversee the 7A Administrators' implementation of the 7A Judgments and Orders pursuant to the Statute and provisions of the 7A Judgment and Order, by the Court's reliance on the City to assist the Court in making sure that the 7A Administrators are properly carrying out their duties consistent and in compliance with the restrictions, conditions, and procedures set by the Court, and as a result of the fiduciary obligations that arise as a result of the placing of others property under 7A Administration. The existence and nature of these aforesaid formal and/or informal official policies, customs and practices are fairly represented and evidenced, in part, by the following:

(a) HPD established and operates training programs to instruct its employees and persons applying to be or appointed 7A Administrators how its wants the 7A Judgments and Orders implemented. In the HPD course of instructions HPD does not provide any instruction or require the participants to read and become familiar with the 7A statute and provides no instructions or information with respect to the rights of the property owners and the 7A Administrator's duties and obligations owed to the owners

under the statute or the common law, including their fiduciary obligations to the owners and has otherwise improperly instructed that one of the goals of the 7A program is for the City to acquire title to the 7A properties;

(b) HPD also fails to provide any instructions concerning the 7A Administrator's duty to pay property taxes, and erroneously instructs them that all income from the property is to be spent on the property, thereby facilitating the owners' permanent loss of the property for failure to pay taxes;

(c) Subsequent to the entry of the 7A Judgment and Order in this case and in other cases, with the knowledge, consent, assistance and acquiescence of the City Defendants who know and rely on the fact that the Court that issued the 7A Judgment and Order relies on HPD to assure that the 7A Judgments and Orders are properly implemented and enforced, none of the 7A Administrators of Plaintiffs' Property and other 7A properties:

– file or have filed the required monthly financial reports with the Court as ordered and required;

– appear or have appeared before the Court regularly at intervals of no less than 60 days as ordered and required even though HPD counsel represents and appears for the Administrators in all the 7A Court proceedings;

– report or have ever reported to the Court the existence of any vacancies as required;

– apply or have ever applied to the Court for authorization to enter into contracts for repairs and services for more than the maximum set forth in the 7A Judgment and Order as ordered and required though such contracts are routinely entered into;

– apply or have ever applied to the Court for authorization to do any additional work as ordered and required;

– pay property taxes as ordered and required; or

– pay surplus funds to the owners of the 7A property as ordered and required;

(d) In violation of the standard provision in 7A Judgments and Orders requiring the Administrators to obtain prior Court approval before entering into any contract for repairs and services in excess of the amount fixed by the Court, HPD instructs its employees and 7A Administrators, and it has adopted and implemented a custom, practice and policy, that prior Court approval is not required where payment for such contracts is broken-up and made under invoices which separately and individually do not exceed the Court imposed limit. The Defendant 7A Administrators, with the knowledge, consent and acquiescence of the City Defendants, on more than one occasion entered into contracts for services and repairs which were known would exceed $3500 without prior Court approval;

(e) Furthermore, in the present case, in callous disregard and deliberate indifference to Plaintiffs' rights and interests, and as a result of the aforesaid policies, customs and practices of the City, when Ms. Samms was assigned to be the 7A Manager for Plaintiffs' Property, HPD

– failed to give Ms. Samms a copy of the 7A Judgment and Order the implementation of which she was supposed to be overseeing,

– failed to inform her that since there was a judicial determination that the repairs required by the 7A Judgment and order had been made, that further judicial authorization had to be obtained for further repairs and services, including emergency repairs, and that property taxes had to be paid and surplus funds paid to Plaintiffs;

– failed to inform her that Plaintiffs' home was in the building and that the Court had expressly provided that they could keep their home rent free and

– otherwise failed to inform her of any of the special circumstances and history pertinent to the Property and Plaintiffs;

(f) The City Defendants and the 7A Administrators failed to take any measures to make sure Plaintiffs' home and property were secure and safe while Plaintiffs were barred from going with-

in ½ mile of the building and never informed them that the doors and gates to their home were left open, that strangers were give free access to their home and property, that their personal property was being stolen, removed and otherwise disposed of;

(g) on July 13, 1987 news conference was held by the City - Victor Braunstein, the then DHCR's Chief Counsel, in the presence of then Manhattan Borough President, Andrew Stein, speaking officially for the City, stated and announced that Plaintiffs would never get their Property back and would be criminally prosecuted; Manhattan Borough President, Andrew Stein, a friend of the father of one of Plaintiffs' tenants who had started a tenants' movement against Plaintiffs, made Plaintiffs a target of reprisal as part of a re-election campaign and subsequently inappropriately pressured City attorneys in proceedings that had been initiated against Plaintiffs to treat Plaintiffs harshly contrary to others similarly situated, and in September 1994 a city official in response to an inquiry by Ms. Rose Schuyler informed Ms. Schuyler that according to HPD officials Plaintiffs' Property would never be returned to them;

(h) contrary to the statutory intent and scheme that properties temporarily placed under 7A Administration to make emergency repairs are not routinely returned to the control and management of the owners after those emergency repairs are done but remain under 7A Administration for extensive and indefinite periods of time or until the City acquires the property for failure to pay real estate taxes;

(i) after Plaintiffs sought termination of 7A Administration because, *inter alia*, the property was not being properly maintained and there were more code violations reported and cited by the buildings inspectors than there were when Plaintiffs managed the Property, the annual building inspections by the Buildings Department's inspectors were discontinued;

(j) HPD failed to promptly inform the Court and Plaintiffs of the 7A Administrators' violations of and failures to comply with the Court degree, including the unauthorized removal, theft and disposition of Plaintiffs' property, unlawful entries into their home

and illegal leases and renewals, and their refusal to otherwise corrective action;

(k) HPD in enforcing the statute and other laws applies different, discriminatory standards to the 7A Administrators than it does to the property owners;

(l) even after this action was instituted and the constitutionality and legality of Defendants actions challenged, including their failures to comply with the 7A Judgment and Order, HPD continued to allow, aid and abet continued violations of the 7A Judgment and Order, including by not seeking prior judicial approval on notice to Plaintiffs for expenditures in excess of the $3500.00 limitation in connection with the installation of a new boiler at a cost in excess of $20,000, and the renewal in 1995 and 1996 of the illegal lease of the ground floor rear rooms; and

(m) the properties in the City of New York which HPD petitions to be placed under 7A Administration are disproportionately those older properties which are or have been subject to rent control and rent stabilization laws which effectively prevent the owners of those properties from raising rents sufficient to repair and maintain and improve the properties.

The Bar Against Plaintiffs' Going Home

17. Since 1988 Plaintiffs have also been enjoined and otherwise prohibited by the Defendants from going within ½ mile of their Property, and, as a result, they have been barred from their home. The aforesaid restrictions were imposed on Mara Kirsh as a condition to her probation and as part of her contempt punishment for alleged acts of interference with the 7A Administrator. Plaintiffs' former counsel, Robert Cammer, advised them that HPD informed him that the same restrictions applied to Joseph Kirsh even though the Court's injunction did not apply to him. In accordance with the bar, Plaintiffs found temporary quarters in a SRO hotel and removed a small portion of their personal possessions from their quarters and locked the doors and gates to the front and rear rooms, and left the keys to their quarters, as required, with the then

7A Administrator John Wells. Since that time they had never given any of the Defendants permission to enter their quarters or permission to remove or otherwise dispose of any of their personal property or to rent out their quarters or any part of their quarters.

Defendants' Failures To Properly Implement the 7A Judgment & Order

18. In violation of the 7A Judgment & Order and state and federal law, with the knowledge, consent and acquiescence of the City Defendants, the 7A Administrators, *inter alia*,:

(a) failed to file the monthly financial reports with the Court and to serve copies of these reports on Plaintiffs as required by the CPLR and Due Process;

(b) failed to appear in Court at intervals not less than every 60 days and to report to the Court the existence of any apartment vacancies;

(c) failed to filed with the Court and to serve Plaintiffs, the final accounting ordered by the Court as a pre-condition to their being relieved of their duties as 7A Administrators of the property upon the Court's acceptance of their resignations;

(d) failed to seek reductions in property taxes and pay the property taxes levied by the City on the property as required by the 7A Judgment & Order and by the Order of the N.Y.S. Supreme Court, N.Y. County, (per Justice Paula J. Omansky) on September 29, 1991, and that Court's finding that sufficient time had elapsed since 1988 to have all the repairs required by the original 7A Judgment and Order made and, as a consequence to require that property taxes be paid in accordance with the order of priorities set forth in the 7A Judgment & Order;

(e) failed to expeditiously make the emergency repairs ordered by the Court in the 7A Judgment and Order;

(f) expended monies for repairs and services that required prior Court authorization without obtaining Court authorization;

(g) failed to keep locked and secured Plaintiffs' quarters and protect Plaintiffs' personal property from theft, damage, and unauthorized access;

(h) entered Plaintiffs' quarters without Plaintiffs' prior knowledge and consent and without Court authorization;

(i) improperly and in violation of Plaintiffs' rights authorized and allowed strangers to enter and use Plaintiffs' quarters, take, remove and dispose of all of Plaintiffs' personal property without Plaintiffs' prior knowledge or consent and without prior Court authorization;

(j) rented out Plaintiffs' home to third parties, and twice renewed one of the leases, without Plaintiffs' prior knowledge and consent and without Court authorization;

(k) failed to pay storage fees for certain motorcycles belonging to Plaintiffs which were removed from the Property and placed in storage without Plaintiffs' prior knowledge and consent and without Court authorization;

(l) failed to otherwise properly administer, manage and maintain the property, pay Plaintiffs surplus monies though knowing that the income from their property was their sole source of income;

(m) disregard the admonition by Justice Omansky that the 7A Judgment and Order was not being complied with by the 7A Administrator and the City; and

(n) failed to terminate 7A Administration of the Property and return its management and control to Plaintiffs.

19. Defendants Frank Vera and Sheila Samms, intentionally, or as a result of their reckless and callous disregard of or deliberate indifference to Plaintiffs' rights and interests, or in accordance with the City's aforesaid formal and/or informal official policy, custom and practices and pursuant to and in furtherance of the City's decision that the Property would never be returned to Plaintiffs, *inter alia*,

(a) failed to properly oversee and supervise the 7A Administrators and the manner in which they were managing the Property and effecting the repairs ordered by the Court;

(b) failed to require the 7A Administrators to proceed in strict accordance with the 7A Judgment and Order;

(c) failed to take adequate measures to assure that Plaintiffs' home and personal property in 239 Elizabeth Street were secured and safe from intrusions, unauthorized entries, damage and theft, including by adequately instructing the 7A Administrators of their duties and obligations with respect to Plaintiffs' home and personal property and conducting frequent inspections to assure that Plaintiffs' home and property were intact;

(d) disregarded the 7A Judgment and Order and failed to provide successor administrators with copies of other Court orders, findings, and stipulations regarding Defendants' obligation to pay the property taxes and to provide Plaintiffs with accountings and access to records;

(e) failed to instruct the 7A Administrators of their obligations to obtain Court authorization for repairs, services and material needed for maintenance and repairs other than those covered by the first order of expenditure priorities;

(f) wrongfully consented, approved and acquiesced in the routine disregard of monetary maximum set in the 7A Judgment & Order for any expenditure that could be made without prior Court approval, failed to take corrective actions and to report violations of the 7A Judgment and Order to the Court;

(g) failed to verify that the expenditures made were reasonable and that the charges and invoices were legitimate;

(h) failed to ascertain that the 7A Administrators were applying for the maximum allowed rent increases, taking appropriate actions to collect rent arrearages and evict non-paying tenants, applying each year for reductions in the property tax and paying those taxes;

(i) failed to properly investigate large expenditures;

(j) entered into compliance agreements which did not reflect the requirements and priorities of the 7A Judgment & Order and which, as a result, caused or contributed to the 7A Administrators' disregard of the provisions, restrictions and priorities set forth in the 7A Judgment and Order and their aforesaid callous disregard and deliberate indifference to Plaintiffs' rights and interests;

(k) took no action to require the 7A Administrators to terminate the illegal leases of Plaintiffs' quarters and allowed one of those leases to be renewed in 1995 and 1996 after discovering that it was entered into illegally, in violation of the 7A Judgment and Order, and in violation of Plaintiffs' constitutional, statutory and common law rights;

(l) failed to notify the Court and/or Plaintiffs that Plaintiffs' quarters had been rented out without Plaintiffs' knowledge and consent and in violation of the 7A Judgment and Order and that all of Plaintiffs' personal possessions on the Property had been removed, stolen or otherwise disposed of without Plaintiffs' prior knowledge or consent and without Court authorization;

(m) failed to investigate the disappearance and disposition of Plaintiffs' personal property after learning that Plaintiffs' quarters had been illegally rented out and unlawfully occupied or to refer the matter to the District Attorney's Office for investigation and prosecution; and

(n) failed to return the Property to Plaintiffs once it became clear that the condition of the building was deteriorating and getting worse while under 7A Administration.

20. Defendant Frank Buzzeo intentionally, or with deliberate indifference, or reckless or callous disregard of, or deliberate indifference to, Plaintiffs' rights and interests, or in accordance with the City's aforesaid formal and/or informal official policy, custom and practices and pursuant to and in furtherance of the City's decision that the Property would never be returned to Plaintiffs, *inter alia*,

(a) failed to properly instruct and supervised Defendants Vera and Samms with respect to the proper implementation of the

7A Judgment and Order and the duties of care owed to Plaintiffs and their home and property and of HPD's obligations to the Court, including to report violations of the 7A Judgment and Order promptly to the Court and to take other corrective action to remedy and cure the 7A Administrators' non-compliance with the restrictions, conditions, provisions and procedures set by the Court and otherwise improper administration and management of the Property;

(b) failed to provide Samms with a copy of the 7A Judgment and Order so she would know exactly what the Court had authorized, required and otherwise provided;

(c) failed to inform Vera and Samms of the judicial determinations and findings respecting the City's obligation to pay or have the 7A Administrators pay the property taxes, including findings and concessions of HPD counsel that the emergency work required by the 7A Judgment and Order was or was deemed completed, and the Court's admonition that the 7A Judgment and Order was not being complied with by the 7A Administrators and the City; and

(d) failed to take such corrective actions as necessary to assure that the 7A Judgment and Order was properly being implement, including notifying the Court and Plaintiffs;

(e) approved compliance plans which were inconsistent with and contrary to the 7A Judgment and Order;

(f) disregarded the rulings, admonitions and comments of the Courts with respect to the management of the Property and the failure to properly comply with the 7A Judgment and Order;

(g) failed to direct that investigations be undertaken to ascertain the reasons for the deteriorating conditions of the building when all the rental income was being spent supposedly for repairs and maintenance;

(h) failed to report the theft, removal and disposition of Plaintiffs' property to the Court and to refer the matter for possible criminal investigation and prosecution; and

(i) failed to take such actions as required to terminate 7A Administration of the property.

21. Prior to the institution of this action Plaintiffs applied on more than one occasion for termination of 7A Administration and return of the Property to their management and control, which would have also ended the bar to their returning to their home but the 7A Administration of their property was not terminated on any of their applications, or by the Court *sua sponte,* and none of the Defendants applied for its termination.

22. As a direct and proximate cause of the aforesaid official City policies, customs and practices, of the City's decision never to let Plaintiffs have their property back, and the aforesaid wrongful conduct of the Defendants, Plaintiffs have been denied all use and enjoyment of their Property and home since 1988, have been denied use and enjoyment of any part of the income generated by the Property, have suffered losses in income that were expected from the property and from its proper management, have been denied regular and accurate accountings of moneys collected and spent, have had the Property made subject to *in rem* proceeding for forfeiture of the Property for failure to pay taxes, have suffered the loss of all their personal property that they left at 239 Elizabeth Street, had the privacy and sanctity of their home and possessions repeatedly violated by unauthorized and illegal, entries, searches and seizures; have been deprived of their home illegally, in violation of their federal and state rights and in contravention of the 7A Judgment and Order, have had to incur substantial legal expenses which they would not have otherwise have incurred, and have had to endure and suffer great mental, emotional and psychological pain and suffering, substantial financial and economic hardship, deprivations and losses, and serious and permanent injuries to their physical, mental, emotional and psychological health.

Plaintiffs Attempts To Avoid
Having To Institute This Action

23. On or about October 7, 1994, Plaintiffs learned for the first time from Mr. Weiss that without prior notice to Plaintiffs and

without prior Court authorization, Plaintiffs' home was entered, their possessions, including papers and effects examined and removed from their home and from other parts of the building, and in 1994 the apartment and front room were rented or leased to other persons or entities, without Plaintiffs' prior knowledge or consent and without prior Court authorization. Plaintiffs have since learned that the front room had been rented to a construction company under a three or five year lease and that the rear rooms were rented to a woman for one year and that that lease was renewed in April 1995 and April 1996 notwithstanding the instant law suit. Mr. Weiss has represented that other than some motorcycles there was nothing of value in Plaintiffs' home and that when he first inspected the property, that the doors and gates to the ground floor front and rear rooms were unlocked.

24. Plaintiffs, through their attorney, in October and November 1994 demanded, *inter alia*, return of their home, return of all their personal property, an accounting of all their personal property that was removed from their home and not returned, copies of all financial reports filed by the Administrators, and termination of the 7A Administration of the Property. Plaintiffs' attorney's calls to the Mayor's Office, to Corporation Counsel's Office, to the General Counsel's Office of HPD, and to various departments of HPD, including Ms. Samms, were to no avail or were not responded to. Upon Defendant Manning's appointment as 7A Administrator, Plaintiff's attorney made the same demands to him.

25. Notwithstanding Plaintiffs' demands and the unlawfulness of the adverse actions that have taken place, neither the City Defendants, nor Messrs. Weiss and Manning took any corrective action, but, on the contrary refused to terminate the illegal leases, and, on the contrary, renewed the lease on the rear ground floor rooms in April 1995 (Weiss) and in April 1996 (Manning), and refused to provide the requisite accountings and to terminate 7A Administration of the Property and continued to expend moneys in violations of the 7A Judgment and Order and without the requisite judicial approval.

II

FIRST CLAIM FOR RELIEF AGAINST THE DEFENDANTS FOR VIOLATIONS OF 42 U.S.C. SECTION 1983, 5th AND 14th AMENDMENTS, AND ARTICLE I § 6 NYS CONSTITUTION

26. Repeat and reallege the allegations in Paragraphs 1 - 25 of this Amended Complaint.

27. Under the Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution, and Article I Section 6 of the Bill of Rights of the Constitution of the State of New York, Plaintiffs as citizens of the United States and the State of New York and persons within and subject to the jurisdictions thereof may not be deprived of their property without Due Process of Law.

28. Plaintiffs were wrongfully and unconstitutionally deprived of their personal property and of their right to the exclusive use and enjoyment of their home in violation of their Due Process rights as a direct and proximate result of the aforesaid wrongful acts, omissions, policies, practices and customs of the Defendants City, Samms, Vera, Buzzeo, Manning, DBM and Weiss, and as heretofore alleged Defendants deprivation of Plaintiffs' constitutional rights was intentional, or the direct and proximate result of Defendants' reckless and callous disregard of, or deliberate indifference to, Plaintiffs' rights to Due Process, and the Defendants have thereby in contravention of 42 U.S.C. § 1983 wrongfully denied Plaintiffs and violated the rights, privileges and immunities secured to them under the aforesaid Amendments of the Constitution of the United States of America. Defendants knew or should have known that their aforesaid wrongful acts were in violation of Plaintiffs' fundamental constitutional and common law rights.

29. As a direct and proximate result of the Defendants' aforesaid unlawful and unconstitutional actions, Plaintiffs have had their most basic and sacred constitutional rights and protected interests violated, have been deprived of their home and personal property without Due Process of Law, and without justification or good

cause therefor, have suffered great mental, emotional, mental, psychological and physical pain and suffering and injuries to their health, substantial economic and financial hardship, deprivation and losses, have and are incurring expenses, including attorney fees, which they would not have otherwise incurred, for which Plaintiffs seek declaratory, mandatory and injunctive relief enjoining further implementation of the Article 7A Judgment and Order and all related orders and injunctions, including any judicial or administrative prohibition barring either or both Plaintiffs from entering upon the Property, termination of the 7A Administration of their property, restoration of their home, an accounting of all their personal property removed from their home and return of their personal property that has not been sold or otherwise disposed of, an accounting of all monies obtained from rents and from the disposition of any of their property, and $10 million in compensatory and consequential damages, and punitive or exemplary damages.

III

SECOND CLAIM FOR RELIEF AGAINST THE DEFENDANTS FOR VIOLATIONS OF 42 U.S.C. SECTION 1983, 5th AND 14th AMENDMENTS, AND ARTICLE I § 7 NYS CONSTITUTION

30. Repeat and reallege the allegations in Paragraphs 1 -29 of this Amended Complaint.

31. Under the Just Compensation Clause of Fifth Amendment and as incorporated and applied to Defendants through the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution, and under Just Compensation Clause of Article I Section 7 of the Bill of Rights of the Constitution of the State of New York, Plaintiffs as citizens of the United States and the State of New York and persons within and subject to the jurisdictions thereof may not be deprived of their property without Just Compensation.

32. Plaintiffs were wrongfully and unconstitutionally deprived of their personal property and of their right to the exclusive use

and enjoyment of their home in violation of the aforesaid Just Compensation Clauses as a direct and proximate result of the aforesaid wrongful acts, omissions, policies, practices and customs of the Defendants City, Samms, Vera, Buzzeo, Manning, DBM and Weiss, and as heretofore alleged Defendants' deprivation of Plaintiffs' constitutional rights was intentional, or the direct and proximate result of Defendants' reckless and callous disregard of, or deliberate indifference to, Plaintiffs' rights to Just Compensation, and the Defendants have thereby in contravention of 42 U.S.C. § 1983 wrongfully denied Plaintiffs and violated the rights, privileges and immunities secured to them under the aforesaid Amendments of the Constitution of the United States of America. Defendants knew or should have known that their aforesaid wrongful acts were in violation of Plaintiffs' fundamental constitutional and common law rights.

33. As a direct and proximate result of the Defendants' aforesaid unlawful and unconstitutional actions, Plaintiffs have had their most basic and sacred constitutional rights and protected interests violated, have been deprived of their home and personal property without Just Compensation, and without justification or good cause therefor, have suffered great mental, emotional, mental, psychological and physical pain and suffering and injuries to their health, substantial economic and financial hardship, deprivation and losses, have and are incurring expenses, including attorney fees, which they would not have otherwise incurred, for which Plaintiffs seek declaratory, mandatory and injunctive relief enjoining further implementation of the Article 7A Judgment and Order and all related orders and injunctions, including any judicial or administrative prohibition barring either or both Plaintiffs from entering upon the Property, termination of the 7A Administration of their property, restoration of their home, an accounting of all their personal property removed from their home and return of their personal property that has not been sold or otherwise disposed of, an accounting of all monies obtained from rents and from the disposition of any of their property, and $10 million in compensatory and consequential damages, and punitive or exemplary damages.

IV

THIRD CLAIM FOR RELIEF AGAINST THE DEFENDANTS FOR VIOLATIONS OF 42 U.S.C. SECTION 1983, 4th, 9th AND 14th AMENDMENTS, AND ARTICLE I § 12 NYS CONSTITUTION

34. Repeat and reallege the allegations in Paragraphs 1 - 33 of this Complaint.

35. Under the Secure In The Home Clause and the Search and Seizure Provisions of the Fourth Amendment, as incorporated and applied to Defendants by the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and under the additional Privacy Rights protected by the Ninth Amendment of the United States Constitution, and under Article I Section 12 of the Bill of Rights of the Constitution of the State of New York, Plaintiffs as citizens of the United States and the State of New York and persons within and subject to the jurisdictions thereof have the constitutional rights to be secure in their persons, houses, papers and effects against unreasonable seizures, not to have their property seized except upon issuance of a warrant by a neutral magistrate upon a showing of probable cause, and not to have the sanctity of their home and their fundamental privacy interests violated by unwarranted governmental intrusions.

36. Plaintiffs were wrongfully and unconstitutionally deprived of their aforesaid constitutional rights set forth in the preceding Paragraph as a direct and proximate result of the aforesaid wrongful acts, omissions, policies, practices and customs of the Defendants City, Samms, Vera, Buzzeo, Manning, DBM and Weiss, and as heretofore alleged Defendants deprivation of Plaintiffs' constitutional rights was intentional, or the direct and proximate result of Defendants' reckless and callous disregard of, or deliberate indifference to, Plaintiffs' constitutional rights, and the Defendants have thereby in contravention of 42 U.S.C. § 1983 wrongfully denied Plaintiffs and violated the rights, privileges and immunities secured to them under the aforesaid Amendments of the Constitution of the United States of America. Defendants knew or should have known

that their aforesaid wrongful acts were in violation of Plaintiffs' fundamental constitutional and common law rights.

37. As a direct and proximate result of the Defendants' aforesaid unlawful and unconstitutional actions, Plaintiffs have had their most basic and sacred constitutional rights and protected interests violated and denied them, and without justification or good cause therefor, have suffered great mental, emotional, mental, psychological and physical pain and suffering and injuries to their health, substantial economic and financial hardship, deprivation and losses, have and are incurring expenses, including attorney fees, which they would not have otherwise incurred, for which Plaintiffs seek declaratory, mandatory and injunctive relief enjoining further implementation of the Article 7A Judgment and Order and all related orders and injunctions, including any judicial or administrative prohibition barring either or both Plaintiffs from entering upon the Property, termination of the 7A Administration of their property, restoration of their home, an accounting of all their personal property removed from their home and return of their personal property that has not been sold or otherwise disposed of, an accounting of all monies obtained from rents and from the disposition of any of their property, and $10 million in compensatory and consequential damages, and punitive or exemplary damages.

V

FOURTH CLAIM FOR RELIEF AGAINST THE DEFENDANTS FOR VIOLATIONS OF 42 U.S.C. SECTION 1983, 5th, 8th & 14th AMENDMENTS, & ARTICLE I §§ 5 & 6 NYS CONSTITUTION

38. Repeat and reallege the allegations in Paragraphs 1 - 37 of this Amended Complaint.

39. Under the Eighth Amendment's Prohibitions against Excessive Fine and Cruel and Unusual Punishment, as incorporated and applied to Defendants under the Due Process and Equal Protection Clauses of the Fourteenth Amendments of the United States Constitution, and under Article I Section 5 of the Bill of Rights of the

Constitution of the State of New York, Plaintiffs as citizens of the United States and the State of New York and persons within and subject to the jurisdictions thereof have the constitutional rights not to be made subject of excessive fines or cruel and unusual punishment and under the Due Process Clause of the Fifth and the Due Process and Equal Protection Clauses of the Fourteenth Amendments of the United States Constitution and Article I, Section 6 of the Bill of Rights of the Constitution of the State of New York, Plaintiffs also have a right not to be subjected to a fundamentally unjust punishment.

40. The lengthy term of 7A Administration was expressly imposed to punish Plaintiffs for harassing their tenants and the bar denying Plaintiffs the right to live in their home was also imposed after the Court found Mara Kirsh in criminal contempt as part of the punishment imposed. The City Defendants' refusal and failure to terminate 7A Administration and/or to allow Plaintiffs to return to their home for approximately eight years and the City's Defendants' stated position that the Property will never be returned to Plaintiffs, with the likelihood that this punishment will continue indefinitely, constitutes the imposition of excessive fines and cruel and unusual punishment in violation of the Plaintiffs' aforesaid Eighth and Fourteenth Amendments and Article I Section 5 of the Bill of Rights of New York's Constitution, and also is fundamentally unjust punishment in violation of Plaintiffs' aforesaid Fifth and Fourteenth Amendments and Article I, Section 6 of the Bill of Rights of New York's Constitution, and the City Defendants are intentionally, or with reckless and callous disregard of, or deliberate indifference to Plaintiffs' aforesaid constitutional rights thereby have wrongfully in contravention of 42 U.S.C. § 1983 denied Plaintiffs and violated the rights, privileges and immunities secured to Plaintiffs under the aforesaid Amendments of the Constitution of the United States of America, thereby causing them to suffer the injuries, losses and damages heretofore alleged. Defendants knew or should have known that their aforesaid wrongful acts were in violation of Plaintiff's most fundamental constitutional and common law rights.

VI

FIFTH CLAIM FOR DECLARATORY & INJUNCTIVE RELIEF UNDER 5th AND 14th AMENDMENTS, AND ARTICLE I § 1 NYS CONSTITUTION

41. Repeat and reallege the allegations in Paragraphs 1 - 40 of this Amended Complaint.

42. Under the Due Process and Just Compensation Clauses of the Fifth, as incorporated and applied to Defendants under the Fourteenth Amendment and under the Due Process, Equal Protection, and Privileges and Immunities Clauses of the Fourteenth Amendment of the United States Constitution, and under Article I Section 1 of the Bill of Rights of the Constitution of the State of New York, Plaintiffs as citizens of the United States and the State of New York and persons within and subject to the jurisdictions thereof have the constitutional rights to Equal Protection of the Law and not to be deprived of their fundamental right to own property and pursue a lawful livelihood except by law of the land, applicable equally, rationally and fairly to all such citizens, or by judgment of their peers.

43. Plaintiffs' aforesaid fundamental property and livelihood rights have been and are subject to greater restriction, limitation, deprivation and loss without just cause or a rational basis

(a) in that Art. 7A applies to property located in one of the five Down State counties and not to similar properties in other parts of the State and therefore Plaintiffs' fundamental property and livelihood rights are unfairly subject to greater restrictions, limitations, deprivation and risk of loss under Art. 7A; and

(b) in that, since Plaintiffs' building was built just after the Civil War, it has been subject to both rent control and rent stabilization laws which placed substantia, unfair, and discriminatory restrictions on rent increases, unrelated to tenants' income and wealth, which, as a result prevent owners of such smaller, older buildings as Plaintiffs' from being able to raise rents sufficiently to maintain, repair and improve the property, as may be required from time to time, pay property taxes and realize a reasonable

return from their property; these restrictions, together with the application of 7A have resulted in a disproportionately number of such smaller, older buildings being placed under 7A Administration and being subsequently lost to the City for failure to pay property taxes while under 7A Administration.

44. As a result, Plaintiffs' aforesaid federal and state constitutional rights have been and are being thereby violated by the Defendants, wherefore Article 7A should be declared unconstitutional and its further application permanently enjoined and such other equitable relief as appropriate granted.

VII

SIXTH CLAIM FOR DECLARATORY & INJUNCTIVE RELIEF 5th AND 14th AMENDMENTS, & ARTICLE I §§ 1, 5-6 NYS CONSTITUTION

45. Repeat and reallege the allegations in Paragraphs 1 - 44 of this Amended Complaint.

46. Article 7A on its face, and/or as applied in New York County, is unconstitutional because the law constitutes and operates as a taking of property without just compensation and without trial by jury and it has operated and been applied in New York County as a means of taking property from the owner, not returning the property to the owner, nor paying the owner just compensation and accordingly Article 7A and/or its implementation by Defendants should be declared and permanently enjoined as unconstitutional.

VIII

SEVENTH CLAIM FOR RELIEF AGAINST THE DEFENDANTS FOR BREACH OF TRUST AND FIDUCIARY OBLIGATIONS

47. Repeat and reallege the allegations in Paragraphs 1 - 46 of this Amended Complaint.

48. When Plaintiffs' Property was placed in Art. 7A Administration, neither the Property nor its income thereby became the property of any of the Defendants but remained the Plaintiffs' property, and, consequently, a trust or constructive trust was thereby established or created for the Property and all rental income received, and the Defendants had a fiduciary, statutory, and constitutional obligation to manage the Property and oversee the management of the Property to make the repairs required by the March 1, 1988 Judgment and Order, and to comply with all the provisions of the 7A Judgment and Order until the Court terminated 7A Administration of the Property and ordered the Property together with all surplus income turned over to Plaintiffs. Similarly, after Plaintiffs were barred from going within ½ mile of the building, Plaintiffs' home and all their personal property was being held in trust by the Defendants as a result of the bailment that was created and Defendants' exercise of exclusive control of Plaintiffs' home and personal property. Defendants were thereby also obligated to take all measures reasonable necessary to preserve and safeguard Plaintiffs' home and personal possessions until the 7A Administration terminated or the bar against Plaintiffs dissolved or lifted, to manage and administer the Property in strict compliance with the terms of the 7A Judgment and Order, and consistent with Plaintiffs' interests.

49. Defendants intentionally, negligently, with reckless, callous or negligent disregard of, or deliberate indifference to Plaintiffs' constitutional and common law rights, breached and failed to comply with their aforesaid fiduciary obligations by their above alleged wrongful actions and omissions, and have thereby have directly and proximately Plaintiffs' aforesaid injuries, losses and damages and wherefore they are also liable to account for all moneys collected and expended, and for punitive and exemplary damages for the expenditure of all moneys that should have been paid over to Plaintiffs.

IX

EIGHTH CLAIM FOR RELIEF AGAINST THE DEFENDANTS FOR MISMANAGEMENT AND NEGLIGENCE

50. Repeat and reallege the allegations in Paragraphs 1 - 49 of this Amended Complaint.

51. The Defendants were obligated to manage the Property and the City Defendants to oversee and supervise the 7A Administrators in their management of the Property in accordance with the standards applied by professional property managers, in compliance with the 7A Judgment and Order, and with the objective of completing the required repairs as promptly as possible at the estimated or reasonable costs, and returning the Property to Plaintiffs, with all surplus funds, as soon as permitted.

52. Defendants by the wrongful actions and omissions described above intentionally, or with reckless or callous disregard of, and deliberate indifference to, Plaintiffs' rights and interests, and in breached the generally recognized standard of care for real estate managers and in violations of the their statutory and common law duties to supervise and oversee its management, failed to properly manage the property and exercise proper supervision and oversight, including by

(a) the 7A Administrators;

– failing or delaying making the repairs ordered by the Court,

– failing to report to and file financial reports with the Court as required,

– expending monies not necessary for completion of the required repairs and without Court authorization,

– paying excessive amounts for certain repairs and services,

– expending surplus monies,

– not timely paying real estate taxes,

– not applying for reductions in real estate taxes,

– not collecting rent arrearages or evicting non-paying tenants,

– not seeking appropriate rent increases, and

– other acts and omissions which have resulted in a substantial deterioration of Property's condition and value and loss of income to Plaintiffs;

(b) by HPD Defendants Buzzeo, Vera and Samms as above alleged in Paragraphs 16-20.

53. By Defendants' aforesaid breaches, mismanagement, negligent supervision and negligence, Defendants have violated the duties of care owed Plaintiffs thereby directly and proximately causing them to suffer the injuries, losses and damages heretofore alleged and wherefore they are also liable to account for all moneys collected and expended, and for punitive and exemplary damages for the expenditure of all moneys that should have been paid over to Plaintiffs.

X

NINTH CLAIM FOR RELIEF AGAINST DEFENDANTS WELLS, LEUNG, WEISS, & MANNING FOR AN ACCOUNTING

54. Repeat and reallege the allegations in Paragraphs 1 - 53 of this Amended Complaint.

55. Defendants Wells, Leung, Weiss and Manning have a duty and obligation to provide Plaintiffs with an accounting of their administration and management of Plaintiffs' Property; furthermore, they were required by the 7A Judgment & Order to file with the Court monthly financial reports every month and pursuant to the CPLR to serve Plaintiffs with copies of each such report, and in the cases of Wells, Leung and Weiss, a final accounting as ordered by the Court upon their respective applications to resign as the 7A Administrators of the Property. In addition, they were

responsible for keeping Plaintiffs home locked and secured from entry by unauthorized persons and Plaintiffs' personal property at 239 Elizabeth Street safe from theft, vandalism and unauthorized searches.

56. In breach of their duty and obligation to provide Plaintiffs with such accountings, Defendants Wells, Leung, Weiss, and Manning have failed or refused to provide the information to Plaintiffs.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for entry of Judgment in their favor and against

A. Defendants Wells, Leung, Weiss and Manning for an accounting of their administration and management of Plaintiffs' Property, and Plaintiffs' home and personal property at 239 Elizabeth Street.

B. The Defendants personally and in their official capacities, jointly and severally:

1. On Plaintiffs' Fifth and Sixth Claims for Relief, Declaring Article 7A unconstitutional on its face or as implemented by Defendants and permanently enjoining its application and enforcement;

2. On Plaintiffs' First, Second, Third, Fourth, Seventh and Eighth Claims for Relief

(i) setting aside, voiding, terminating, or enjoining the enforcement of the March 1, 1988 Judgment and Order, and all other Judgments and Orders of Courts or administrative agencies which have enjoined either or both Plaintiffs from going near or returning to their Property,

(ii) ordering and directing Defendants to take all measures necessary to fully restore to Plaintiffs all property rights Plaintiffs had prior to entry of the March 1, 1988 Judgment and Order as the true and lawful owners of the Property, including full and all management rights,

(iii) ordering and directing Defendants to take all measures necessary to return to Plaintiffs for their exclusive use and enjoyment their apartment, the store front, and all personal property that has been removed and not otherwise disposed of and until such time as Plaintiffs home is restored to them for their exclusive use and enjoyment, providing Plaintiffs at no cost to Plaintiffs a comparable home in the same neighborhood,

(iv) requiring Defendants to account for all rents and any other monies received from the Property, including any interest paid, and all the personal property, papers and effects of Plaintiffs that were at any time removed from the Property,

(v) enjoining all and further action in the *in rem* proceeding for the forfeiture of the Property for failure to pay property taxes pending final Judgment in this case and ordering the City to recalculate taxes due in light of the reductions in property taxes that Plaintiffs were entitled to receive had Defendants time applied for such reductions in taxes, and

(vi) and awarding Plaintiffs $10 million in compensatory and consequential damages, and for punitive or exemplary damages, as may be determined by the trier of fact to be appropriate, for all monies expended which should have been turned over to Plaintiffs, and for all monies lost as a result of Defendants' misconduct, breaches of fiduciary duties, and/or mismanagement;

3. For the costs of this action, including reasonable attorneys fees; and

4. For such further and different relief as may be necessary, just and proper.

Dated: July 1996

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SUPREME COURT, U.S.

No. 98-439

In The

Supreme Court of the United States

October Term, 1998

MARA KIRSH and JOSEPH KIRSH,

Petitioners,

vs.

THE CITY OF NEW YORK, THE COMMISSIONER OF THE DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK, DAVID BRADLEY MANAGEMENT CO., DAVID WEISS, DEBBIE LEUNG, JOHN WELLS, SHEILA SAMMS, JANE AND JOHN DOE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS DAVID BRADLEY MANAGEMENT CO. AND DAVID WEISS

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COUNTER QUESTION PRESENTED

Should this Court exercise its discretion to review an express factual finding by the court below that Respondents are private citizens not acting under color of law when the proper rule of law was applied and the decision is not in conflict with other circuits?

STATEMENT PURSUANT TO RULE 29.6

Respondent, David Bradley Management Co., has no parent companies and no nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

The Petition of Mara and Joseph Kirsh (collectively, the "Petitioner") for a Writ of Certiorari requests a review of the Second Circuit's unpublished Summary Order affirming the Judgment of the District Court in its entirety. The District Court's opinions were based upon the extensive and undisputed evidence demonstrating that the Respondents David Bradley Management Company (David Bradley) and David Weiss (collectively, "the Respondents") were not state or city employees or acting in concert with the state or the city, and as such were not state actors. The District Court also found that David Weiss' appointment as a 7A Administrator did not make him a state actor.

Based upon the record, the District Court granted the Respondents' motion for summary judgment dismissing the complaint against the Respondents as well as the other 7A Administrators. The Court of Appeals for the Second Circuit carefully considered all of the appellants' arguments on appeal and reached the same conclusion as the District Court. The Second Circuit affirmed the District Court's findings in the Summary Order:

> We affirm the judgment of the District Court in its entirety substantially for the reasons in its opinions stated below.

(Citations omitted) (App-2).[1]

In his petition to this Court, the Petitioner does not raise a single important question of law warranting review. The

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1. Citations in the form "App-" refer to pages of the Appendix to the Petition.

Petitioner has made a conclusory claim that the Second Circuit decision conflicts with other circuits on the question of whether mere court appointment creates state action for purposes of § 1983 liability. As demonstrated below, there is no compelling reason for this Court to review this meritless argument.

A. Petitioner Has Omitted Several Material Facts Which Support The Courts' Findings That The Respondents Are Not State Actors.

Given the District Court's factual findings, the Petitioner's failure to discuss material facts concerning Respondents David Weiss and David Bradley in his Petition, is conspicuous by its absence. The omitted facts formed the basis for the District Court's findings that: (1) Respondents did not act in concert with the city or the state; and (2) mere court appointment of a 7A Administrator does not create state action. The omitted facts are as follows:

David Weiss, a private citizen with real estate experience, was appointed a 7A Administrator as a result of a Stipulation dated August 14, 1992, "so ordered" by the Honorable Gerald R. Klein, Judge of the Civil Court of the City of New York, Housing Part. Under the Stipulation, the Petitioner expressly consented to the appointment of David Weiss as an Administrator. (A-1010).[2]

In his capacity as 7A Administrator, David Weiss retained David Bradley of which he was a principal, as managing agent of the building located at 239 Elizabeth Street, New York, New York. (A-433). David Bradley operated, managed and repaired the premises on behalf of the tenants. (A-433, 581). David

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2. Citations in the form "A-" refer to pages of the Appendix submitted to the Second Circuit.

Bradley collected rent from the tenants of the building, applied the rents to the repair and maintenance of the buildings and corrected the conditions that were dangerous to the tenants. (A-434). Compensation for managing the building came from the rental proceeds of the building. No funding was provided by the government. (App. D-12).

In September 1993, David Bradley learned from John McGrinder, an independent contractor on the site, that the New York City Fire Department had conducted an inspection and found fire code violations. (A-434). In a Violation Order dated September 14, 1993, the Fire Department required that David Bradley remove all motorcycles and inflammable liquids and rubbish forthwith, remove all accumulations of inflammable rubbish from the storefront/basement and maintain all parts of the premises free from such accumulations at all times. (A-1021). David Bradley authorized McGrinder to correct the conditions found to be in violation in order to comply with the Fire Department's Violation Order. (A-434). McGrinder hired Jerry Basciano to respond to the Fire Department's Violation Order. (*Id.*).

Based on these facts, the District Court found that the 7A Administrator retained a fiduciary obligation to the building and tenants thereof, and managed the building independently, choosing tenants and contractors without approval from the City Department of Housing Preservation and Development ("HPD"). (App. D-6, 7-12). The District Court further found that the 7A Administrator acted on behalf of the tenants (App. D-6, 12), and concluded that Respondents could not be state actors.

B. Petitioner Has Misstated The History Of The Case.

1.

Petitioner misrepresents the basis for his federal court action. Petitioner claims that relief was sought in federal court rather than state court because the 7A statute immunized the city from liability. (Pet.-5). There is no support anywhere in the record for this statement. Petitioner, as found by the District Court, had more than adequate State remedies which the Petitioner repeatedly ignored. In fact, in two other instances, Petitioner attempted to remove the state 7A proceeding to Federal Court only to have Judge Ward remand it on both occasions. (A-49).

2.

Petitioner now claims that the basis for liability against Weiss, is due to his appointment as a 7A Administrator. Petitioner's original theory, as alleged in his Summons and Complaint, was that Respondents acted as agents of the City and under the supervision of the Commissioner of HPD. (App. F-2). Furthermore, Petitioner claimed that Sheila Samms, one of the City defendants, acted in concert with Weiss. (App. F-2). Petitioner changed the theory when discovery unequivocally demonstrated that Samms and Weiss were not acting in concert.

3.

There is no proof to demonstrate that Weiss disposed of the Petitioner's personal property. Instead, the proof demonstrates that an independent contractor retained by David Bradley responded to a New York City Fire Department Violation Order which required that all debris and rubbish be

removed. Petitioner has not adduced any proof that any rubbish and inflammable material removed was the Petitioner's. Furthermore, Petitioner has not demonstrated that property allegedly present in the building at the time he was barred from entry, was the rubbish removed over four years later by any contractors retained by David Bradley.

4.

Petitioner mischaracterizes the significance of the Second Circuit's unpublished opinion. The opinion was issued under Court of Appeals Rule § 0.23 providing that a Summary Order may be issued in those cases, (like this one), in which the decision is unanimous and each Judge of the panel believes no jurisdictional purpose would be served by a written opinion. Thus, it seems clear that the Second Circuit did not view its Order as conflicting with any other circuit.

REASONS FOR DENYING THE WRIT

Supreme Court Rule 10 provides that a writ of certiorari will be granted only for compelling reasons. Petitioner has failed to identify any significant and compelling legal issues raised by the decisions of the lower courts which merit this Court's attention. The District Court's decisions below (and the Second Circuit's affirmance) were based upon the facts of the case and were not a declaration of a new rule of law conflicting with the decisions of this Court or any other circuits.

The Court should follow its long standing holding that it will not grant certiorari when the review sought turns solely upon analysis of particular facts of the case rather than some clear or overriding legal controversy, *see Texas v. Meade*, 465 U.S. 1041, 1043 (1994), and deny the writ.

I.

THE PETITION MUST BE DENIED BECAUSE THE DECISIONS BELOW ARE NOT IN CONFLICT WITH ANY OTHER CIRCUIT.

The Petitioner's claim that there is a conflict in the circuits concerning § 1983 liability for persons appointed by a court is without merit. The Second Circuit's Summary Order affirming the District Court's order granting summary judgment in this case does not conflict with another United States Court of Appeals decision. Moreover, Petitioner did not demonstrate any other basis for concluding, as required by Sup. Ct. R. 10(a), that this is an important matter that requires the Court's consideration.

The District Court's decisions (and the Second Circuit's affirmance) involved a detailed and thorough review of the extensive evidence presented in the case and the application of well-established legal principles to the factual record. The lower court's lengthy opinions correctly analyzed the specific factual circumstances arising out of the appointment, on consent, of this 7A Administrator. After careful consideration, the Court found that the facts demonstrated that this 7A Administrator was not an employee of the City or the State; that this 7A Administrator neither acted in concert nor conspired with any employee of Housing Preservation; and that this 7A Administrator was akin to a fiduciary, acting in the best interests of the tenants. As such, the Court correctly found that, under the facts of this case, this 7A Administrator could not be liable under 42 U.S.C. § 1983.

The Petitioner contends that there is a conflict and inconsistency among the circuits with respect to whether court-appointed individuals act under color of state law. Not only is the issue presented by Petitioner overbroad, there is no such

conflict. The Petitioner has identified nothing more than the mere legal truism that the determination of whether an individual is acting under color of state law turns on the particular facts of the case. This Court has recognized that different factual circumstances may lead to different conclusions concerning individuals acting under color of state law. In *Polk v. Dodson*, 454 U.S. 312 (1981) this Court found that a court-appointed public defender did not act under color of the law when performing a lawyer's traditional function as counsel to a defendant in a criminal proceeding. However, the Court did not rule out a finding that under different factual circumstances such an attorney could be acting under color of law.

Petitioner has also failed to alert the Court that resolution of any alleged conflict does not end the inquiry. (App. D-13). As noted by the District Court, allowing plaintiffs to pursue a civil rights claim against the defendants could erode the immunity proffered to administrators under New York Real Property Actions and Proceedings Law Section 778. Moreover, it is well established that a court-appointed administrator is similarly cloaked with a Judge's immunity. *See Bradford Audio Corp. v. Pious*, 392 F.2d 67 (2nd Cir. 1968); *Kermit Construction Corp. v. Banco Credito*, 547 F.2d 1 (1st Cir. 1976). Thus, even assuming *arguendo* Petitioner's contentions to be true, the respondents are immune from suit. (*See* App. D-13).

There is also no cause for this Court to reach the Petitioner's unsupportable arguments since the District Court correctly found that the Petitioner's adequate and available state remedies precluded any finding that Petitioner's due process rights were violated. To substantiate a claim under § 1983, Petitioner must not only allege a state actor committed the conduct complained of, but also that the conduct deprived him of his constitutional rights. *See Parratt v. Taylor*, 451 U.S. 527 (1979). If the state

provides an adequate post-deprivation remedy, a state actor's deprivation of plaintiff's property does not result in a violation. *See Hudson v. Palmer*, 468 U.S. 517 (1984). A provision of adequate state post-deprivation remedies provides all the due process that is required. (*Id.*). Thus, it has been held that the civil action of conversion (the remedy sought by Petitioner) is an adequate remedy when an individual claims property was wrongfully taken. *See Tigner v. The State of New York*, 559 F. Supp. 25, 742 F.2d 1432 (2nd Cir. 1981). As such, Petitioner has failed to demonstrate an important or compelling reason to justify review by this Court.

In sum, this case does not warrant the Court's attention as the District Court's decisions (and the Second Circuit's affirmance) correctly applied the law to the extensive factual record, and is not in conflict with decisions of other circuits.

CONCLUSION

For the reasons given above, the Petition should be denied.

Respectfully submitted,

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